TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 74

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT DESIGNATED BY THE PRESIDENT, ETC., PLAINTIFF IN ERROR,

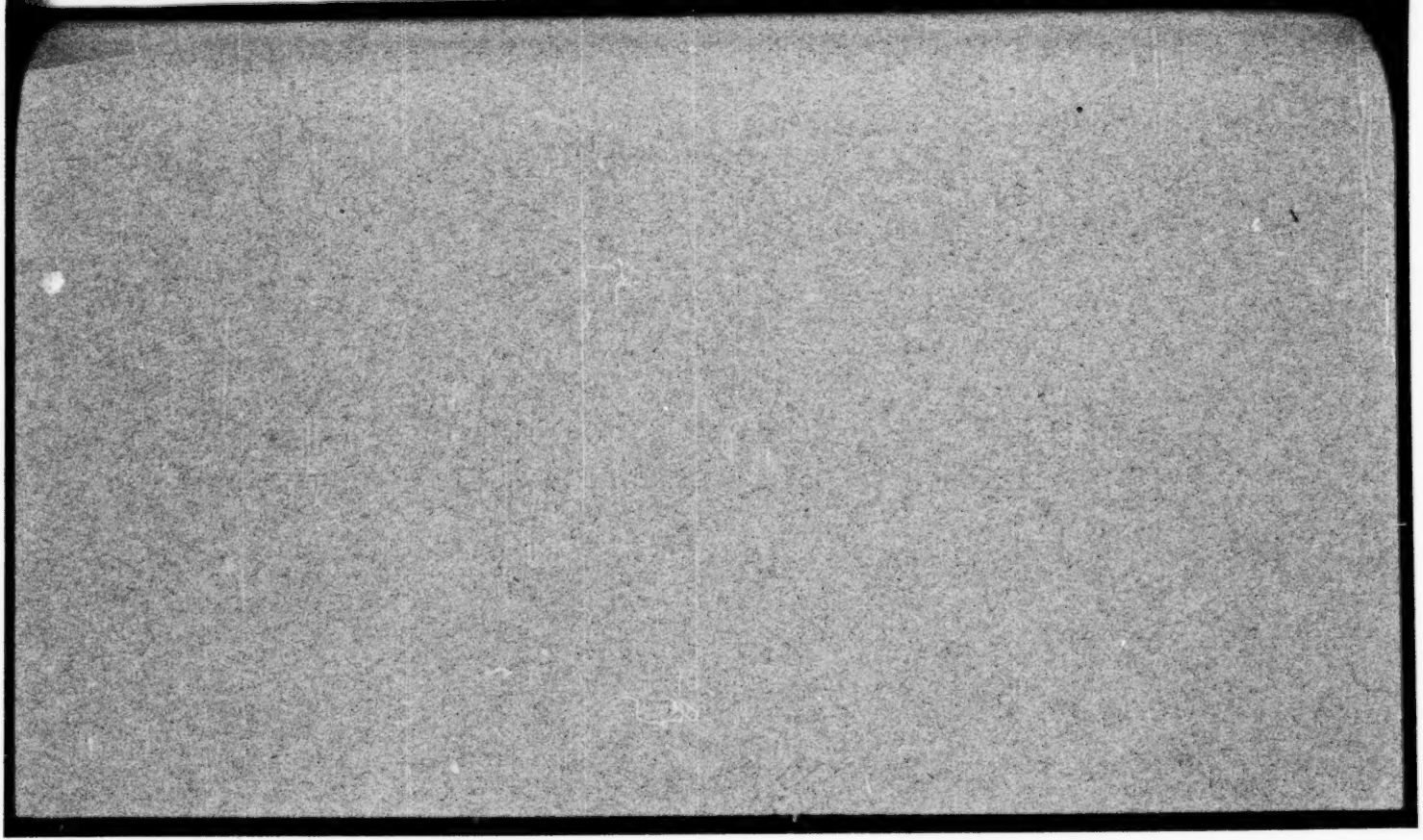
vs.

THOMAS E. O'NEIL

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

FILED JUNE 1, 1926

(31,985)



(31,985)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 418

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT DESIGNATED BY THE PRESIDENT, ETC., PLAINTIFF IN ERROR,

vs.

THOMAS E. O'NEIL

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

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[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

THOMAS E. O'NEIL, Plaintiff,

against

JAMES C. DAVIS, Director General of Railroads, as Agent Designated by the President, Defendant

STATEMENT UNDER RULE 234

A summons, naming as defendant Walker D. Hines, as agent designated by the President (Lehigh Valley Railroad), was served on Guy E. Jackson on June 17, 1920. Messrs. Alexander & Green served upon the attorneys for the plaintiff a notice of appearance for the defendant and demand for a copy of the complaint on July 6, 1920. A complaint was served on July 23, 1920, whereupon and on August 20, 1920, a notice of motion, returnable August 26, 1920, was served on behalf of the defendant to strike out parts thereof or to require the plaintiff to make the complaint more definite and certain by stating from what person and the capacity of such person, if any or against what corporation plaintiff demands judgment. On August 24, 1920, an amended complaint was served omitting certain parts of the original complaint and stating against whom the plaintiff demanded judgment. On September 16, 1920, an answer to the amended complaint was served.

[fols. 2-4] On August 23, 1923, the plaintiff's attorneys served a notice of motion, returnable on August 28, 1923, for an order reinstating the cause of action, which had been marked abated on February 13, 1923, and substituting James C. Davis, the Director General of Railroads, as party defendant in the place and stead of Walker D. Hines. James C. Davis Director General of Railroads, as agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, appeared specially by Messrs. Alexander & Green, his attorneys, upon the return of said motion for the sole and single purpose of opposing it. The motion was granted by an order made herein on October

31, 1923, whereupon James C. Davis, Director General of Railroads, as agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, appearing specially for such purpose, appealed to the Appellate Division of the Supreme Court of the State of New York for the First Department from said order, which was affirmed by said Appellate Division by an order made herein on the 18th day of January, 1924.

On February 4, 1924, James C. Davis, Director General of Railroad, as agent designated by the President, procured an order requiring the plaintiff to show cause on the 6th day of February, 1924, why he should not be allowed to serve and file a supplemental answer in the form annexed to said order. The motion thereon was denied by an order entered herein on February 23, 1924.

Except as stated above, there has been no change in the parties. Messrs. Olcott, Olcott & Glass have been substituted as attorneys for the plaintiff in the place of Messrs. Olcott, Bonynge, McManus & Ernst.

[fol. 5] IN SUPREME COURT OF NEW YORK

[Title omitted]

AMENDED NOTICE OF APPEAL

SIRS: You will please take notice that the defendant, James C. Davis, Director General of Railroads, as agent designated by the President under Section 206 of the Transportation Act, 1920, hereby appeals to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department from the judgment made herein on the 8th day of March, 1924, and entered and filed in the office of the Clerk of the County of New York on the 8th day of March, 1924, in favor of the plaintiff and against James C. Davis, as Agent designated by the President, for One thousand one hundred twenty-two and 34/100 Dollars ($1,122.34), and from the order denying the defendant's motion to set aside the verdict and for a new trial, made herein on the 7th day of March, 1924, and entered and filed in the office of the Clerk of New York County on the 7th

day of March, 1924, as resettled by the order made herein [fol. 6] on the 8th day of April, 1924, and entered and filed in the office of the Clerk of the County of New York on the 9th day of April, 1924, and from the order denying the motion of James C. Davis, Director General of Railroads, as Agent designated by the President, for an order striking the said judgment from the files of this Court and declaring the same null, void and of no effect, and for other relief, made herein on the 8th day of April, 1924, and entered and filed in the office of the Clerk of the County of New York on the 9th day of April, 1924, and from each and every part of said judgment and of each of said orders.

You Will Please Take Further Notice that upon said appeal the defendant will bring up for review the order made herein on the 23rd day of February, 1924, and entered and filed in the office of the Clerk of the County of New York on the 23rd day of February, 1924, denying the defendant's motion for leave to serve and file a supplemental answer, and the order made herein on the 31st day of October, 1923, and on said day entered and filed in the office of the Clerk of the County of New York, granting plaintiff's motion to substitute James C. Davis, Director General of Railroads, as Agent designated by the President, as defendant herein, and the order made herein by the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department on the 18th day of January, 1924, and on said day entered and filed in the office of the Clerk of said Appellate Division, affirming said order entered herein on [fol. 7] the 31st day of October, 1923.

Dated, New York, April 9, 1924.

Yours, &c., Alexander & Green, Attorneys for the Defendant, James C. Davis, Director General of Railroads, as Agent Designated by the President under Section 206 of the Transportation Act, 1920.

Office and Post Office address: No. 120 Broadway, Borough of Manhattan, city of New York, N. Y.

To Messrs. Olcott, Bonynge, McManus & Ernst, attorneys for the plaintiff; Honorable James A. Donegan, clerk of the county of New York.

[fol. 8] IN SUPREME COURT OF NEW YORK

THOMAS E. O'NEIL, Plaintiff,

against

WALKER D. HINES, as Agent Designated by the President (Lehigh Valley Railroad), Defendant

SUMMONS

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, N. Y., June 17, 1920.

Olcott, Bonynge, McManus & Ernst, Attorneys for Plaintiff.

Post office address and Office: No. 170 Broadway, Borough of Manhattan, New York City, N. Y.

[fol. 9] IN SUPREME COURT OF NEW YORK

THOMAS E. O'NEIL, Plaintiff,

against

WALKER D. HINES, as Agent Designated by the President (Lehigh Valley Railroad), Defendant

AFFIDAVIT OF BERNARD E. PERELSON

Bernard E. Perelson, being duly sworn, says that he is over the age of 21 years, and that on the 17th day of June, 1920, at No. 143 Liberty Street, in the Borough of Manhattan, City, County and State of New York, he served the summons in this action, a copy whereof is hereto annexed, on Guy E. Jackson, designated agent for the defendant in this action by delivering copies of the same to such defendant personally and leaving the same with him. He further says that he knew the person served as aforesaid to be the person mentioned and described in said summons as the designated agent for the defendant in this action.

Bernard E. Perelson.

Sworn to before me this 17th day of June, 1920. Allen D. Emil, Notary Public, Kings County No. 83. Kings County Register No. 1038. N. Y. Co. Clerk's No. 198. N. Y. County Register No. 1231.

[fol. 10] IN SUPREME COURT OF NEW YORK

[Title omitted]

NOTICE OF APPEARANCE

SIRS: Please to take notice that the defendant appears in this action, and that we are retained as attorneys for him therein, and demand that a copy of the complaint and all papers in this action be served on us at our office, No. 120 Broadway, Borough of Manhattan, New York City, N. Y.

Dated New York, July 6th, 1920.

Yours, &c., Alexander & Green, Attorneys for Defendant.

Office and P. O. address: No. 120 Broadway, Borough of Manhattan, New York City, N. Y.

To Olcott, Bonynge, McManus & Ernst, Esqs., attorneys for plaintiff, 170 Broadway, New York City.

[fol. 11] IN SUPREME COURT OF NEW YORK

[Title omitted]

COMPLAINT

The plaintiff above named, by Olcott, Bonynge, McManus & Ernst, his attorneys, complaining of the defendant, alleges:

First. Heretofore and at the times hereinafter mentioned, the defendant above named was and still is a foreign corporation, organized and existing under the laws of the State of Pennsylvania, and up to or about March 1st, 1920, the said defendant, Lehigh Valley Railroad was under Federal control and management, through the agency of

Walker D. Hines, the Director General of Railroads, or his predecessor in office, and by General Order No. 50, made and issued pursuant to law by the said Director General, it was ordered and directed in substance that suits and litigations growing out of matters arising out of, or during Federal control of the said railroads should be brought against the said Director General of Railroads, or his successor in office, and by the Federal Transportation Act of 1920, it was provided that suits and litigations growing out of said Federal control should be brought against the Agent [fol. 12] designated by the President; and the President has, by proclamation, duly designated the present Director General of Railroads, Walker D. Hines, or his successor in office, to be such agent.

Second. That the defendant is a common carrier of passengers for hire, operating its trains through certain portions of the States of New York and Pennsylvania, and through the places hereinafter mentioned.

Third. That on or about the 22nd day of February, 1920, the defendant above named received the plaintiff as a passenger on one of its cars at the station of Auburn, County of Cayuga, State of New York, and agreed to carry him safely as a passenger thereon, or on another of its trains from the said town of Auburn to the town of Hornell, County of Steuben, State of New York, and that the fare and charge was duly paid by the plaintiff to the said defendant, or its agents.

Fourth. That while lawfully riding on said train, and in one of the cars thereof, as a passenger as aforesaid, and before said train had reached the destination to which the said defendant had agreed to transport the plaintiff as aforesaid, the plaintiff was seriously injured by reason of being struck on his head by a heavy steel ventilator, which owing to the negligence of the defendant had been insecurely fastened and attached, and had become dislodged and fell and struck the plaintiff, causing and inflicting upon the plaintiff the severe and painful injuries and suffering hereinafter mentioned.

Fifth. That the plaintiff suffered a deep scalp wound, and concussion of the brain as a result of the blow received

[fol. 13] on his head aforementioned, and was for several days in a delirious condition, aggravated by an attack of erysipelas, brought on by subjection to the sudden shock and subsequent unavoidable exposure; that the plaintiff suffered, and continues to suffer from violent pains in his head, intermittent fits of faintness and dizziness, and has and will for a long time continue to suffer from pain and mental anguish

Sixth. That as a result of the blow plaintiff received upon his head, he was forced to discontinue his professional career as an actor and was confined to his home for a long period during which he was under constant medical attention; that the injuries he sustained as a result of the negligence of the defendant company are of a permanent and lasting nature, and plaintiff suffers, and will forever continue to suffer from a depression in the skull, a partial baldness, chronic nervous disorders, and impairment of his entire nervous system, defective articulation of speech produced by a nervous hesitancy heretofore unknown to the plaintiff, all of which disabilities will seriously handicap plaintiff in his profession.

Seventh. That the plaintiff has necessarily expended, and is informed and verily believes that he will in the future expend large sums of money endeavoring to be cured of the said injuries.

Eighth. That by reason of the premises plaintiff has sustained damages in the sum of fifteen thousand ($15,000.00) dollars.

Wherefore plaintiff demands judgment in the sum of [fol. 14] fifteen thousand ($15,000.00) dollars, together with the costs and disbursements of this action.

Olcott, Bonynge, McManus & Ernst, Attorneys for Plaintiff.

O. & P. O. address: 170 Broadway, Borough of Manhattan, City of New York.

Duly sworn to by Thomas E. O'Neil. Jurat omitted in printing.

[fol. 15] IN SUPREME COURT OF NEW YORK

[Title omitted]

AFFIDAVIT AND NOTICE OF MOTION TO STRIKE OUT ALLEGATIONS OR TO MAKE COMPLAINT MORE DEFINITE AND CERTAIN

SIRS: You will please take notice that upon the annexed affidavit of Clifton P. Williamson, verified the 20th day of August, 1920, the summons herein with the affidavit as to the service thereof, filed in the office of the Clerk of the County of New York, on or about the 10th day of June, 1920, and the defendant's notice of appearance herein, filed in the office of the Clerk of said County on or about the 7th day of July, 1920, and upon the complaint herein, we shall move this Court at a Special Term, Part I thereof, to be held at the New York County Court House in the Borough of Manhattan, City and County of New York, on the 26th day of August, 1920, at 10:15 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order (1) striking out from the complaint the words "and at the times hereinafter mentioned, the defendant above named was and still is a foreign corporation, organized and [fol. 16] existing under the laws of the State of Pennsylvania," and the words "said defendant" contained in the paragraph of the complaint designated "First," and the word "company" contained in the paragraph of the complaint designated "Sixth," on the ground that said words and the matters thereby alleged, and each of them, are irrelevant to the alleged cause of action set out in the complaint herein, or (2) if such relief should be denied, requiring that the complaint herein be made more definite and certain by stating from what person and the capacity of such person, if any, or against what corporation plaintiff demands judgment; and for such other and further relief as may be just.

Dated New York, August 20th, 1920.

Yours, etc., Alexander & Green, Attorneys for Defendant.

Office & P. O. address: No. 120 Broadway, Borough of Manhattan, City of New York, N. Y.

To Olcott, Bonynge, McManus & Ernst, Esqs., attorneys for plaintiff.

[fol. 17] State of New York,
County of New York, ss:

Clifton P. Williamson, being duly sworn, deposes and says, that he is an attorney and counselor-at-law and a member of the firm of Alexander & Green, attorneys for the defendant herein.

That the defendant has not answered or served any other pleading herein, and his time to answer, demur or move herein has been extended by a stipulation of the plaintiff's attorneys to and including the 2nd day of September, 1920.

That from a statement of the case made to deponent by the defendant, his employees, agents and servants, deponent verily believes that said defendant has a good and substantial defense upon the merits to the alleged cause of action set forth in the complaint, or to some part thereof.

Clifton P. Williamson.

Sworn to before me this 20th day of August, 1920. George H. Makepeace, Notary Public No. 342. New York County. Register No. 2268. Commission expires March 30, 1922.

[fol. 18] In Supreme Court of New York

[Title omitted]

Amended Complaint

The Plaintiff above-named by Olcott, Bonynge, McManus & Ernst, his attorneys, complaining of the defendant alleges upon information and belief:

First. Heretofore and at the times hereinafter mentioned, the Lehigh Valley Railroad above named, was, and still is, a foreign corporation, organized and existing under the laws of the State of Pennsylvania, and up to or about March 1st, 1920, the said Lehigh Valley Railroad was under Federal control and management, through the agency of Walker D. Hines, the Director-General of Railroads, or his predecessor in office, and by General Order No. 50 duly made and issued pursuant to law by the said Director-Gen-

eral, it was ordered and directed in substance that suits and litigations growing out of matters arising out of or during Federal control of the said Railroad should be brought against the said Director-General of Railroads, or his successor in office; and by the Federal Transportation Act of 1920, it was provided that suits and litigations growing out of said Federal control be brought against the Agent desig- [fol. 19] nated by the President of the United States of America, and the President has, by proclamation, duly designated the present Director-General of Railroads, Walker D. Hines, or his successor in office, to be such agent.

Second. That the defendant is a common carrier of passengers for hire, operating its trains through certain portions of the States of New York, Pennsylvania, and through the places hereinafter mentioned.

Third. That on or about the 22nd day of February, 1920, the defendant above named, received the plaintiff as a passenger on one of its cars at the station of Auburn, County of Cayuga, State of New York, and agreed to carry him safely as a passenger thereon, or on another of its trains from the said town of Auburn to the town of Hornell, County of Steuben, State of New York, and that the fare and charge was duly paid by the plaintiff to the said defendants, or its agents.

Fourth. That while lawfully riding on said train and in one of the cars thereof, as a passenger as aforesaid, and before said train had reached the destination to which the said defendant had agred to transport the plaintiff as aforesaid, the plaintiff was seriously injured by reason of being struck on his head by a heavy steel ventilator which, owing to the negligence of the defendant had been insecurely fastened and attached, and had become dislodged and fell and struck the plaintiff, causing and inflicting upon the plaintiff the severe and painful injuries and suffering hereinafter mentioned.

Fifth. That the plaintiff suffered a deep scalp wound and [fol. 20] concussion of the brain as a result of the blow received on his head aforementioned, and was for several days in a delirious condition, aggravated by an attack of

erysipelas, brought on by subjection to the sudden shock and subsequent unavoidable exposure; that the plaintiff suffered, and continues to suffer, from violent pains in his head, intermittent fits of faintness and dizziness, and has, and will for a long time continue to suffer from, pain and mental anguish.

Sixth. That, as a result of the blow plaintiff received upon his head, he was forced to discontinue his professional career as an actor, and was confined to his home for a long period during which he was under constant medical attention; that the injuries he sustained as a result of the negligence of the defendant are of a permanent and lasting nature, and plaintiff suffers and will forever continue to suffer, from a depression in the skull, a partial baldness, chronic nervous disorders and impairment of his entire nervous system, defective articulation of speech produced by a nervous hesitancy heretofore unknown to the plaintiff, all of which disabilities will seriously handicap plaintiff in his profession.

Seventh. That the plaintiff has necessarily expended and is informed and verily believes that he will in the future expend large sums of money endeavoring to be cured of the said injuries.

Eighth. That by reason of the premises plaintiff has sustained damages in the sum of Fifteen thousand ($15,000) dollars.

Wherefore plaintiff demands judgment against the defendant Walker D. Hines, as Agent designated by the Presi-
[fol. 21] dent, in the sum of Fifteen thousand ($15,000) Dollars, together with the costs and disbursements of this action.

Olcott, Bonynge, McManus & Ernst, Attorneys for Plaintiff.

Office & P. O. address: 170 Broadway, Borough of Manhattan, New York City.

Duly sworn to by Sylvester Ryan. Jurat omitted in printing.

[fol. 22] IN SUPREME COURT OF NEW YORK

[Title omitted]

ANSWER

The defendant, answering the complaint herein, avers and alleges:

I. Answering the allegations contained in the paragraph or subdivision of the complaint designated "First" defendant denies upon information and belief that Walker D. Hines is the present Director-General of Railroads and that heretofore and at the times mentioned in the complaint and up to or about March 1st, 1920, the Lehigh Valley Railroad Company, mentioned in the complaint as Lehigh Valley Railroad, was under Federal control and management through the agency of Walker D. Hines, the Director-General of Railroads, or his predecessor in office, except that defendant admits that railroad properties, material and equipment belonging to the Lehigh Valley Railroad Company were at said times under Federal control and management through the agency of Walker D. Hines, as Director-General of Railroads and his predecessor in office.

II. Upon information and belief, defendant denies each [fol. 23] and every allegation contained in the paragraphs or subdivisions of the complaint designated respectively "Second," "Third," "Fourth" and "Eighth."

III. Answering the allegations contained in the paragraphs or subdivisions of the complaint designated respectively "Fifth" and "Seventh," and each of them, defendant denies that he has any knowledge or information thereof sufficient to form a belief.

IV. Answering the allegations contained in the paragraph or subdivision of the complaint designated "Sixth" and each of them defendant denies that he has any knowledge or information thereof sufficient to form a belief, except that defendant denies upon information and belief that plaintiff sustained any injuries as a result of any negligence of the defendant.

Wherefore defendant demands judgment dismissing the complaint herein with costs.

Alexander & Green, Attorneys for Defendant.

Office & P. O. address: No. 120 Broadway, Borough of Manhattan, New York City.

[fol. 24] *Duly sworn to by Clifton P. Williamson. Jurat omitted in printing.*

[fol. 25] In Supreme Court of New York

[Title omitted]

Affidavit and Notice of Motion to Reinstate the Cause of Action Herein and to Substitute James C. Davis, the Director-General of Railroads, as Party Defendant

Sirs: Please take notice that upon the annexed affidavit of Walter A. Lynch, verified the 18th day of August, 1923, and upon all the pleadings and proceedings heretofore had herein, a motion will be made at Special Term, Part I, of this Court, to be held at the County Court House thereof, on the 28th day of August, 1923, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order reinstating the cause of action herein, heretofore marked "Abated" and substituting James C. Davis, the Director-General of Railroads as a party defendant in the place and stead of Walker D. Hines, and for such other and further relief as to the Court may seem just and proper.

Dated New York, August 20, 1923.

Yours, &c., Olcott, Bonynge, McManus & Ernst, Attorneys for Plaintiff, #170 Broadway, New York City.

[fol. 26] To Alexander & Green, Esqs., Attorneys for Walker D. Hines; Evan Shelby, Esq., Attorney for James C. Davis, Lehigh Valley Railroad.

STATE OF NEW YORK,
County of New York, ss:

Walter A. Lynch, being duly sworn, deposes and says: That he is one of the attorneys for the plaintiff herein. That this is an action brought by the plaintiff against the defendant for damages for injuries received by the said plaintiff while a passenger on a train operated by the defendant herein. That the action was commenced herein by the service of a summons on or about the 6th day of July, 1920, and thereafter the defendant by his attorneys, Alexan- [fol. 27] der and Green, whose office and post office address is 120 Broadway, Borough of Manhattan, City of New York, duly appeared, and issue was finally joined by the service of the answer of the defendant on the 16th day of September, 1920.

That thereafter the case was actually noticed for trial and duly appeared on the calendar on the 10th day of January, 1923, and was adjourned, as deponent is informed and verily believes, to the February call of the said court, but through an error the case appeared on the day calendar of the court for the 13th day of February, 1923, unknown to plaintiff's attorneys, and on the call of the said day calendar, was marked "Abated" by the attorneys for the defendant herein.

That the reason for the action being marked "Abated," as dependent is informed and believes, was the fact that the defendant, Walker D. Hines, had on the 13th day of February, 1923, ceased to hold office as the Agent designated by the President, and that his tenure of office had expired more than one year prior to the said 13th day of February, 1923, and through inadvertence plaintiff's attorneys had failed to move for a substitution of the new Director-General of Railroads and Agent designated by the President as a party defendant within the limitations in such cases made and provided by the United States Revised Statutes.

Deponent further states that heretofore a motion was made before Mr. Justice Ford to restore the case to the day calendar of the court for trial. That the motion was denied with leave to renew on the substitution of the new Director-General as a party defendant.

Deponent states further that a previous motion for the [fol. 28] relief prayed for herein was likewise made and denied without prejudice for the reason that proper notice had not been given to the new Director-General and notice of motion had only been served upon Alexander & Green, attorneys for Walker D. Hines, and had not been served upon Evan Shelby, who deponent is informed and believes, is regional counsel for the new Director-General of Railroads, James C. Davis.

Deponent therefore prays that an order be made reinstating the said cause of action and permitting the substitution of James C. Davis, the present Director-General and Agent designated by the President of the United States as a party defendant in the place and stead of Walker D. Hines.

Walter A. Lynch.

Sworn to before me this 18th day of August, 1923. William Polglase, Notary Public, Kings County, No. 66. Kings County Reg. No. 4067. N. Y. County Clerk's No. 176. N. Y. County Reg. No. 4154.

[fol. 29] In Supreme Court of New York

[Title omitted]

Order Reinstating Cause of Action and Substituting James C. Davis, Director-General of Railroads, as Agent Designated by the President, as Party Defendant—October 31, 1923

A motion having heretofore been made before me for an order to reinstate the cause of action herein and to substitute James C. Davis, Director-General of Railroads, as agent designated by the President, as party defendant in the place and stead of Walker D. Hines, and the said motion having duly come on to be heard before me on the 28th day of August, 1923, at a Special Term, Part I, of this court, and Walter A. Lynch, Esq., of counsel, appearing in support of said motion, and Alexander & Green, Esqs., at-

torneys for the defendant, appearing specially on behalf of James C. Davis, in opposition thereto, now on reading and filing the notice of motion, dated August 20, 1923, with proof [fol. 30] of due service thereof, the affidavit of Walter A. Lynch, verified the 18th day of August, 1923, and upon the pleadings herein, and due deliberation having been had thereon,

Now, on motion of Olcott, Bonynge, McManus & Ernst, attorneys for the plaintiff herein, it is

Ordered, that the said cause of action be and the same hereby is reinstated, and it is further

Ordered, that James C. Davis, Director-General of Railroads, as agent designated by the President, be and he hereby is substituted in place and stead of Walker D. Hines, as party defendant herein.

Enter.

E. J. McG., J. S. C.

[fol. 31] In Supreme Court of New York

[Title omitted]

Notice of Appeal

Sirs: You will please take notice that James C. Davis, Director-General of Railroads, as agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, appearing specially herein for the purpose of this appeal only, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Department, from the order made herein on the 31st day of October, 1923, and on said day entered in the office of the Clerk of the County of New York granting plaintiff's motion to reinstate the alleged cause of action herein, and to substitute James C. Davis, Director-General of Railroads as agent designated by the President, in the place and stead of

Walker D. Hines as party defendant herein, and from each [fol. 32] and every part of said order.

Dated New York, November 13, 1923.

Yours, &c., Alexander & Green, Attorneys for James C. Davis, Director-General of Railroads, as Agent Designated by the President Pursuant to Section 206 of the Transportation Act, 1920, appearing specially herein for the purpose of this appeal only.

Office and P. O. address: No. 120 Broadway, Borough of Manhattan, City of New York, N. Y.

To Messrs. Olcott, Bonynge, McManus & Ernst, attorneys for plaintiff.

[fol. 33] In Supreme Court of New York, Appellate Division

Thomas E. O'Neil, Respondent,

vs.

James C. Davis, Director General of Railroads, as Agent Designated by the President, etc., Impleaded, etc., Appellant

Order of Affirmance—January 18, 1924

An appeal having been taken to this Court by the defendant above named from an order of the Supreme Court, New York County, entered on the 31st day of October, 1923, granting plaintiff's motion to reinstate the cause of action herein, and to substitute James C. Davis, Director General of Railroads as agent &c., in place of Walker D. Hines as party defendant and said appeal having been argued by Mr. H. S. Ogden of counsel for the appellant, and by Mr. Walter A. Lynch of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $10 costs and disbursements to the respondent.

Enter.

J. P. C.

[fol. 34] IN SUPREME COURT OF NEW YORK

[Title omitted]

PROPOSED SUPPLEMENTAL ANSWER, AFFIDAVIT, AND ORDER TO SHOW CAUSE FOR LEAVE TO SERVE AND FILE SUPPLEMENTAL ANSWER

Upon reading the annexed affidavit of Clifton P. Williamson, verified the 4th day of February, 1924, and the proposed supplemental answer thereto annexed, and upon all the proceedings heretofore had herein, I do hereby

Order, that the plaintiff, or his attorneys, show cause at a Special Term, Part I, of the Supreme Court of the State of New York, appointed to be held in and for the County of New York at the New York County Court House in the Borough of Manhattan, City of New York, on the 6th day of February, 1924, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made herein allowing the defendant James C. Davis, Director General of Railroads, as agent designated by the President, to serve and file the proposed supplemental answer hereto annexed, and why the said defendant should not have such other and further relief in the premises as to the Court may seem just.

[fol. 35] Sufficient reason therefor appearing, let service of a copy of this order and the annexed affidavit and proposed supplemental answer upon Olcott, Bonynge, McManus & Ernst, the attorneys for the plaintiff, by leaving a copy thereof at the office of said attorneys, at Number 170 Broadway, in the Borough of Manhattan, City of New York, before six o'clock in the afternoon on the 4th day of February, 1924, be deemed good and sufficient service thereof.

Dated New York, February 4, 1924.

Nathan Bijur, Justice of the Supreme Court of the State of New York

[Title omitted]

STATE OF NEW YORK,
County of New York, ss:

Clifton P. Williamson, being duly sworn, deposes and says that he is an attorney at law and a member of the firm of Alexander & Green, the attorneys for the defendant [fol. 36] James C. Davis, Director General of Railroads, as agent appointed by the President, appearing herein only because he is compelled to do so by order of this Court entered on the 31st day of October, 1923, and affirmed by an order of the Appellate Division of the Supreme Court of the State of New York, First Department, entered on the 18th day of January, 1924, reserving his objection to his substitution as defendant herein and reserving his objection to the jurisdiction of this Court to entertain and proceed with this action.

That Walker D. Hines ceased to be the Director General of Railroads and the agent appointed by the President pursuant to section 206 of the Transportation Act 1920 on the 18th day of May, 1920, and on said day was succeeded by John Barton Payne as the Director General of Railroads and the agent appointed by the President pursuant to section 206 of the Transportation Act 1920.

That James C. Davis, the substituted defendant, became Director General of Railroads and agent appointed by the President pursuant to section 206 of the Transportation Act 1920, succeeding said John Barton Payne, on March 28th, 1921.

That, on the 28th day of August, 1923, the plaintiff made a motion to substitute James C. Davis as the defendant, which motion was opposed by deponent's firm, appearing specially for said James C. Davis for the sole purpose of opposing said motion, but the same was granted, and on the 31st day of October, 1923, an order was made and entered substituting him as defendant.

That said James C. Davis, appearing solely for the purpose, duly appealed to the Appellate Division of the Supreme Court of the State of New York, First Department, from said order and said Appellate Division affirmed said order by an order made herein on the 18th day of January,

1924, a copy of which was served upon deponent's firm on [fol. 37] the 23rd day of January, 1924.

That this is an action to recover damages for personal injuries claimed to have resulted from negligence, and the alleged cause of action is claimed to have accrued on or about February 22nd, 1920, more than three years prior to the substitution herein.

That section 206 (a) of the Transportation Act 1920 provides, in part, as follows:

"Such actions, suits or proceedings may within the periods of limitation now prescribed by state or federal statutes, but not later than two years from the date of the passage of this act, be brought in any court which but for federal control would have had jurisdiction of the cause of action had it arisen against such carrier."

That the date of the passage of said act was February 28, 1920.

That James C. Davis, Director General of Railroads, as agent designated by the President, contends that the time of the commencement of this action was the time he was substituted as defendant, and that the alleged cause of action is barred by both the state and federal statutes, and desires to set up such defenses by plea in order that the judgment will necessarily be an adjudication thereon and the questions presented thereby will be preserved.

That the attorneys for the plaintiff are Messrs. Olcott, Bonynge, McManus & Ernst, whose office, as appears from the preceding papers herein, is at Number 170 Broadway, in the Borough of Manhattan, City of New York.

[fol. 38] That this action has appeared upon the calendar from time to time and now stands adjourned, as deponent is informed, to the February Term of this Court, and is likely to appear on the calendar within the next few days.

That no previous application has been made for the annexed order.

Clifton P. Williamson.

Sworn to before me this 4th day of February, 1924. George H. Makepeace, Notary Public, No. 40, New York County. Register No. 4242. Commission expires March 30, 1924.

[Title omitted]

James C. Davis, Director General of Railroads, as agent designated by the President pursuant to section 206 of the Transportation Act, 1920, reserving his objection to the [fol. 39] substitution of himself as defendant herein and reserving his objection to the jurisdiction of this Court to entertain and proceed with this action, and appearing herein only because he is compelled to do so by order of this Court entered on the 31st day of October, 1923, and affirmed by an order of the Appellate Division of the Supreme Court of the State of New York, First Department, entered on the 18th day of January, 1924, adopting the answer of the former defendant Walker D. Hines, and for a further and supplemental answer to the complaint herein, avers and alleges:

First

For a separate and distinct defense to the alleged cause of action set forth in the complaint, this defendant further avers and alleges, upon information and belief:

That this action was not commenced and was not pending at any time against the agent designated by the President of the United States pursuant to section 206 of the Transportation Act 1920 within two years from the date of the passage of said act, to wit, within two years from the 28th day of February, 1920.

Second

For a further separate and distinct defense to the alleged cause of action set forth in the complaint, this defendant further avers and alleges, upon information and belief:

That this action was not commenced and was not pending at any time against the agent designated by the President of the United States pursuant to section 206 of the Transportation Act 1920 within three years after the accrual of the alleged cause of action set forth in the complaint.

[fol. 40] Third

For a further separate and distinct defense to the alleged cause of action set forth in the complaint, this defendant further avers and alleges, upon information and belief:

That no petition or supplemental complaint or petition to substitute this defendant herein was made within twelve months after the resignation of Walker D. Hines as Director General of Railroads and as agent designated by the President pursuant to section 206 of the Transportation Act 1920, or within twelve months after the resignation of John Barton Payne as Director General of Railroads and as such agent, and the motion to substitute this defendant was not made and this defendant was not substituted as defendant herein within twelve months after he became Director General of Railroads, and agent designated by the President pursuant to section 206 of the Transportation Act 1920.

Wherefore this defendant demands judgment dismissing the complaint herein, with costs.

Alexander & Green, Attorneys for the Defendant, James C. Davis, Director General of Railroads, as Agent Designated by the President Pursuant to Section 206 of the Transportation Act 1920.

Office and P. O. address: No. 120 Broadway, Borough of Manhattan, City of New York, N. Y.

[fol. 41] *Duly sworn to by Clifton P. Williamson. Jurat omitted in printing.*

[fol. 42] IN SUPREME COURT OF NEW YORK

[Title omitted]

ORDER DENYING MOTION FOR LEAVE TO SERVE AND FILE SUPPLEMENTAL ANSWER

Present: Hon. Robert F. Wagner, Justice.

The following papers numbered 1 to 4 read on this motion, 6th of February, 1924.

	Papers numbered
Order to show Cause and Affidavits Annexed	1 to 3
Answering Affidavits	4

Upon the foregoing papers this motion is denied.

See opinion.

Dated February 23rd, 1924.

R. F. W., J. S. C.

[fol. 43] [Title omitted]

MINUTE ENTRY

March 6th, 1924.

I hereby certify that this cause was tried before Hon. Charles D. Donohue and a jury, on the 4th and 5th days of March, 1924, and a verdict rendered therein for the plaintiff for the sum of $1,000.00.

Motions to set verdict aside and for a new trial denied. 60 days to make a case.

James A. Donegan, Clerk.

[fols. 44-54] IN SUPREME COURT OF NEW YORK

[Title omitted]

JUDGMENT

The above entitled action having been duly tried before Mr. Justice Donohue and a jury, at Trial Term, Part IV, of the Supreme Court, held in and for the County of New York, at the County Court House thereof, on the 4th day of March, 1924, and the jury having duly rendered a verdict in favor of the plaintiff and against the defendant in the sum of one thousand ($1,000.00) dollars, and the costs of the plaintiff having been duly taxed in the sum of $122.34/100.

Now, on motion of Olcott, Bonynge, McManus & Ernst, attorneys for the plaintiff herein, it is

Adjudged that the plaintiff, Thomas J. O'Neil, do recover of the defendant, James C. Davis, as agent designated by the President, the sum of one thousand ($1,000.00) dollars, together with the sum of $122.34/100 dollars, cost as taxed, making in all the sum of $-122.34/100 and that the plaintiff have execution thereof.

Dated New York, March 8, 1924.

James A. Donegan, Clerk. (Seal.)

[fol. 55] IN SUPREME COURT OF NEW YORK

[Title omitted]

Settled Case

Before Hon. Charles D. Donohue, Justice, and a Jury

New York, March 4, 1924.

Appearances of Counsel

Olcott Bonynge, McManus & Ernst, Esqs. (170 Broadway), by Walter A. Lynch, Esq., of counsel.

Alexander & Green, Esqrs. (120 Broadway), by Thomas J. Brennan, Esq., and H. S. Ogden, Esq., of counsel.

Twelve prospective jurors were placed in the jury box.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Brennan: With your Honor's permission, I would like to make a preliminary motion before the counsel proceeds.

The Court: Very well, Mr. Brennan.

[fol. 56] Mr. Brennan: The defendant James C. Davis, Director General of Railroads, as agent designated by the President, objects to the jurisdiction of this Court to entertain and proceed with this action, and to the jurisdiction of this Court over this defendant. The grounds of such objections are as set forth in the separate defenses set out in the defendant's proposed supplemental answer, for leave to file which the defendant has heretofore applied and now applies, namely, that this action was not commenced and was not pending against this defendant and this defendant was not a party to this action at any time within two years from the date of the passage of the act of the Congress of the United States, known as the Transportation Act of 1920, or at any time within twelve months after the resignation of Walker D. Hines, and of his successor, John Barton Payne, as Director General of Railroads and as the agent

designated by the President, pursuant to Section 206 of the Transportation Act of 1920, or at any time within three years after the accrual of the alleged cause of action set forth in the complaint.

The defendant, therefore, moves that the complaint be dismissed. I have a case here which your Honor may care to see, Lawrey v. Hines, 237 N. Y. 174 (tendering papers to the Court).

The Court: I will be very glad to look at it, Mr. Brennan. Had federal control ceased before this action was commenced?

Mr. Brennan: Why, no.

Mr. Ogden: Yes, federal control had ceased.

Mr. Brennan: Before it was commenced?

Mr. Ogden: Yes, sir. The action was commenced July 17th, 1920; federal control ceased March 1st, 1920.

[fol. 57] The Court: Have you seen this case, Mr. Lynch?

Mr. Lynch: Why, I have not seen it in the supplement report. I have one of the original reports, however, from the Court of Appeals. I might say at this time that the objection which has now been raised has already come up before Mr. Justice Wagner on a motion to file a supplemental answer. That motion, setting forth the identical objections which are now raised, was denied by Mr. Justice Wagner.

I will first outline the proceedings which have been had in this case, which is very unusual, I think Mr. Brennan will admit; that prior to that time the action was originally commenced against Walker D. Hines, and subsequently we made our motion to substitute the present agent designated by the President, James C. Davis, and our contention at Special Term and in the Appellate Division, where the order of the Special Term was affirmed, held in substance that this was an action not against Walker D. Hines, but an action against the Federal Government. All the cases in other states, as well as this Lawrey case, as a matter of fact also hold the same contention, and the Lawrey case sets forth specifically that the procedure which we adopted and which was adopted prior to that decision is the correct one, with respect to a substitution, and we urged this case on the appeal in the Appellate Division, and we were sustained in it. These matters have all been before at

least two of the other Judges, and the Appellate Division, and we have been sustained on the question in every event.

Mr. Brennan: But I am informed, if your Honor please, although I did not have anything to do with the argument before Mr. Justice Wagner, that an affidavit was submitted by the attorneys for the plaintiff which was not served upon [fol. 58] the defendant, and which intimated or stated that the defendant had not paid certain costs to the plaintiff. Now, that may have been one of the causes for Judge Wagner's ruling.

The Court: Then at the present time I will deny the motion, Mr. Brennan, and allow you an exception.

Mr. Brennan: Yes. At this time may I also place upon the record, if your Honor pleases, that the defendant, reserving the objections to the jurisdiction of this Court as before stated, and the exceptions taken to the overruling of said objections, and proceeding with the defense of this action only because compelled to do so by the orders of this Court, the defendant now moves for leave to renew his motion to be allowed to file a supplemental answer, which motion was denied by Mr. Justice Wagner at Special Term, Part I of this court by an order made herein on February 23rd, 1924, without assigning any reason therefor; and if such leave is granted the defendant moves that the proposed supplemental answer now on file be and be deemed to be the supplemental answer herein.

In that connection I can only repeat what I said to your Honor a moment ago, that as I have it here in writing—I will read it to your Honor the way it has been furnished to me by the defendant's attorneys:

"Since the decision of said motion we have learned that an affidavit was submitted, after the argument in opposition thereto, on behalf of the plaintiff, although the Court directed the service of and the defendant's attorneys requested a copy of any papers submitted in opposition to said motion, and the plaintiff's attorneys mailed to the [fol. 59] defendant's attorneys a copy of the memorandum submitted by them in opposition to the motion but has never served upon the defendant's attorneys a copy of the affidavit, and said attorneys had no knowledge that an affidavit had been submitted until after the decision of the motion.

No mention was made on the argument, nor is made in the memorandum, of the subject of costs, but in the affidavit the point is made that the motion should be denied because certain costs awarded the plaintiff by the Appellate Division had not been paid. All costs awarded to the plaintiff have now been paid."

The Court: Well, was there ever any application made to Judge Wagner for reargument of the motion upon the grounds set forth in the memorandum which you have now just read to the Court? Was that called to his attention?

Mr. Brennan: I believe not, your Honor.

Mr. Lynch: I know there was not.

Mr. Ogden: No motion for reargument was made. The order was served two or three days before this case came up on the calendar.

Mr. Lynch: If the Court pleases, with respect to the statements made by counsel relative to what had transpired before Mr. Justice Wagner, I might state for the record that the plaintiff's attorneys followed to the last detail the instruction of Mr. Justice Wagner; that the order before Mr. Justice Wagner, if I recall correctly, came on on an order to show cause returnable on a certain date, and the attorneys for the plaintiff were never instructed by the Court to serve their answering affidavit upon the attorneys for the defendant. There was a question as to whether we were instructed to serve our memorandum on the attorneys for the defendant, and we did so serve them. If I [fols.60-116] recall correctly, we submitted our affidavit at the time of the hearing of tae motion, and not subsequently to the motion, and all the proceedings taken by the plaintiff's attorneys in this case and in the motion before Mr. Justice Wagner were perfectly regular.

The Court: And you object to the supplemental answer?

Mr. Lynch: I object to the supplemental answer, on the ground that the matter has already been adjudicated before Mr. Justice Wagner. There has been no motion made for reargument, or no appeal taken therefrom.

The Court: In view of Mr. Justice Wagner's decision, Mr. Brennan, I will deny the application at this time and allow you an exception.

[fol. 117] The jury was duly empaneled and sworn.

Mr. Lynch: That is all. I take it, Mr. Brennan, that you will concede that James C. Davis is the agent designated by the president under the terms of the Federal Transportation Law?

Mr. Brennan: I do not think it is necessary that we should have any concession on it. I think the Court will take judicial notice of the proclamations of the President of the United States.

The Court: The Court will take judicial notice of that fact. There is no question but what such a proclamation was issued?

Mr. Brennan: Oh, no.

Mr. Lynch: Well then, at this time, for the purpose of the record, I move to amend the complaint to the extent [fol. 118] of alleging that James C. Davis is the agent designated by the President under the Federal Transportation Law.

The Court: I will grant the motion.

Mr. Brennan. Exception.

Plaintiff rests.

Mr. Brennan: I now move to dismiss the complaint, if the Court pleases, upon the grounds stated heretofore, and upon the additional grounds that the action was not commenced and was not pending against this defendant, and this defendant was not a party to this action, at any time within two years from the date of the passage of the Act of Congress of the United States known as the Transportation Act of 1920, or at any time within twelve months after the resignation of Walker D. Hines or his successor as Director General of Railroads and as the agent designated by the President pursuant to Section 206 of the Transportation Act of 1920, or at any time within three years after the accrual of the alleged cause of action set forth in the complaint.

The Court: I will deny your motion and grant you an exception.

Mr. Brennan: Exception. I move to dismiss the complaint upon the further ground that the plaintiff has failed to prove the cause of action alleged in the complaint, or any cause of action against this defendant.

The Court: I will deny the motion.

Mr. Brennan: Exception. At this time, if your Honor please, I desire to renew the motion made at the opening of the case for leave to file a supplemental answer.

[fols. 119-168] The Court: I will make the same disposition; I will deny your motion and grant you an exception.

[fols. 169-193] Testimony closed.

Mr. Brennan: Now, if the Court please, I renew the motions made at the opening of the case and at the close of the plaintiff's case, upon all the grounds mentioned at both times.

Motion denied. Exception for the defendant.

[fols. 194-197] VERDICT

New York, March 5, 1924.

(The sealed verdict of the jury was opened, and found to be in favor of the plaintiff in the sum of $1,000.)

Mr. Ogden: If the Court please, the defendant, reserving the objections heretofore taken to this Court's entertaining and proceeding with this trial, now moves on the exceptions taken at the trial, and upon the Judge's minutes to set aside the verdict upon the ground that it is contrary to law, contrary to the evidence, and on all the grounds stated in Section 549 of the Civil Practice Act, except the ground of insufficiency.

Motion denied. Exception for the defendant.

[fol. 198] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[Title omitted]

ORDER DISMISSING APPEAL—December 18, 1925

An appeal having been taken to this Court by the defendant from a judgment of the Supreme Court, New York County, entered on the 8th day of March, 1924, and from

an order made by said Court denying a motion for a new trial, entered on the 7th day of March, 1924, as resettled by an order entered on the 9th day of April, 1924, also from an order entered on the 9th day of April, 1924, denying defendant's motion for an order striking the said judgment from the files and declaring the same null and void, and also bringing up for review an order of said Court entered on the 23rd day of February, 1924, denying defendant's motion for leave to serve and file a supplemental answer, and also the order entered on the 31st day of October, 1923, granting plaintiff's motion to substitute James C. Davis, Director-General &c., as defendant herein, and also the order entered on the 18th day of January, 1924, affirming the said order of October 31st, 1923, and said appeal having been argued by Mr. Clifton P. William-[fols. 198a & 198b] son, of counsel for the appellant, and by Mr. Monroe M. Schwarzschild of counsel for the respondent, and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the judgment and orders entered on March 7th, 1924, as resettled, and the order entered on April 9th, 1924, so appealed from be and the same are hereby, in all things, affirmed; and that the respondent recover of the appellant the costs of this appeal.

And it is further ordered that the appeal from the order entered on October 31st, 1923, and from the order of this Court entered January 18th, 1924, affirming said order of October 31, 1923, be and the same hereby is dismissed.

Enter.

J. P. C.

[fol. 199] In Supreme Court of New York

[Title omitted]

Order Substituting Party Defendant—January 11, 1926

A motion having been made by Andrew W. Mellon, Director General of Railroads, as Agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, that he be substituted as the defendant herein in the place and stead of James C. Davis, Director General

of Railroads, as Agent designated by the President, and said motion having duly come on to be heard on the 11th day of January, 1926, and the Court having heard Herbert S. Ogden, of counsel for said Andrew W. Mellon, as aforesaid, in support of said motion, and no one appearing in opposition thereto, now, upon reading the notice of motion herein dated January 5, 1926, and the affidavit of Herbert S. Ogden, verified the 5th day of January, 1926, thereto annexed, and upon all proceedings heretofore had herein, and on motion of Alexander & Green, attorneys for Andrew W. [fols. 200 & 200½] Mellon, Director General of Railroads, as Agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, it is hereby .

Ordered that said motion be, and the same hereby is, granted; and it is further,

Ordered that Andrew W. Mellon, Director General of Railroads, as Agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, be, and he hereby is, substituted as defendant herein in the place and stead of James C. Davis, Director General of Railroads, as Agent designated by the President, and the title of this action is hereby amended accordingly.

Enter.

A. J. L., J. S. C.

[fol. 201] In Supreme Court of New York

[Title omitted]

Judgment

The defendant having appealed to the Supreme Court of the State of New York, Appellate Division, First Judicial Department, from a judgment of this Court entered on the 8th day of March 1924, and from an order made by this Court denying a motion for a new trial entered on the 7th day of March, 1924, as resettled by an order entered on the 9th day of April, 1924, and also from an order entered on the 9th day of April 1924, denying defendant's motion for an order striking the said judgment from the files and declaring same null and void, and also bringing up

for review an order of this Court entered on the 23rd day of February 1924, denying defendant's motion for leave to serve and file a supplemental answer, and also the order entered on the 31st day of October 1923, granting plaintiff's motion to substitute James C. Davis, Director General, etc. as defendant herein, and also the order entered on the 18th day of January, 1924, affirming the said order of October 31, 1923, and the said appeal having been argued by Mr. Clifton P. Williamson, of counsel, for the appellant, and Mr. Monroe M. Schwarzschild, of counsel for the respondent, and due deliberation having been had upon said appeal, and [fol. 202] The said Appellate Division having unanimously ordered and adjudged that the judgment and order entered on March 7, 1924, as resettled, and the order entered on April 9, 1924, and the order entered on February 23, 1924, be affirmed in all things, granting to respondent the cost of said appeal; and

The said Appellate Division having further ordered that the appeal from the order entered on October 31, 1923, and from the order of said Appellate Division entered January 18, 1924, affirming said order of October 31, 1923, be dismissed,

An an order having heretofore been duly entered herein wherein and whereby Andrew W. Mellon, Director General of Railroads, as agent designated by the President, pursuant to Section 206 of the Transportation Act, 1920, was substituted as the defendant herein, in the place and stead of James C. Davis, Director General of Railroads, as agent designated by the President, said James C. Davis having resigned and said Andrew W. Mellon having by proclamations of the President dated December 14, 1925, been appointed Director General of Railroads and agent pursuant to Section 206 of the Transportation Act, 1920, effective at midnight on the 31st day of December, 1925, and

The costs of the plaintiff upon said appeal having been duly taxed in the sum of $112.70, now, therefore it is

Adjudged that the judgment and order entered on March 7, 1924 as resettled and the order herein entered on April 9, 1924, be affirmed in all things; and it is

Further adjudged that the appeal from the order herein entered on October 31, 1923, and from the order of the

Supreme Court, Appellate Division, First Department entered herein January 18, 1924, affirming said order of October 31, 1923, be dismissed; and it is

[fols. 203 & 203½] Further adjudged that the plaintiff, Thomas E. O'Neil, do recover from the defendant, Andrew W. Mellon, Director General of Railroads, as Agent designated by the President, pursuant to Section 206 of the Transportation Act, 1920, the sum of $112.70 as costs, as heretofore duly taxed by the Clerk of the Supreme Court, County of New York, and that said plaintiff have execution therefor.

Dated New York, February 3, 1926.

William T. Collins, Clerk.

[fol. 204] In Supreme Court of New York, Appellate Division

[Title omitted]

Order Denying Leave to Appeal to the Court of Appeals—January 29, 1926

The above named defendant having moved for leave to appeal to the Court of Appeals from the order of this Court entered herein on the 18th day of December, 1925, and the judgment thereupon entered,

Now, upon reading and filing the notice of motion with proof of due service thereof, and the affidavit of Herbert S. Ogden in support of said motion, and the affidavit of Monroe M. Schwarzschild in opposition thereto, and after hearing Mr. Herbert S. Ogden for the motion, and Mr. Monroe M. Schwarzschild opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10 costs.

[fol. 205] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[Title omitted]

ASSIGNMENTS OF ERROR

Now comes the defendant, Andrew W. Mellon, Director General of Railroads, as Agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, by Clifton P. Williamson, his attorney, and says that in the record and proceedings in the above entitled cause there is manifest error which occurred upon the trial of said cause and in the proceedings had prior thereto and upon which he will rely in his prosecution of the writ of error in the above entitled cause in this, to wit:

1. That the Supreme Court of the State of New York erred in ordering that the cause of action herein be reinstated and that James C. Davis, Director General of Railroads, as Agent designated by the President be substituted as party defendant in the place and stead of Walker D. Hines, and the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department erred in affirming said order.

2. That the Supreme Court of the State of New York erred in overruling the objection of James C. Davis, [fol. 206] Director General of Railroads, as Agent designated by the President, to the jurisdiction of said Court to entertain and proceed with this cause and to the jurisdiction of said court over James C. Davis, Director General of Railroads, as Agent designated by the President, and the said Appellate Division erred in sustaining such ruling.

3. That the Supreme Court of the State of New York erred in denying defendant's motion for leave to serve and file a supplemental answer, setting up as defenses to this action that the action was not commenced and was not pending against the proper defendant and the proper defendant was not a party to said action at any time within two years from the date of the passage of the Act of the Congress of the United States, known as the Transporta-

tion Act, 1920, or at any time within twelve months after the resignation of Walker D. Hines, or of his successor John Barton Payne as Director General of Railroads and as Agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, or at any time within three years after the accrual of the alleged cause of action set forth in the complaint; and said Appellate Division erred in sustaining and affirming said ruling.

4. That the Supreme Court of the State of New York erred in entertaining and proceeding with this action as against James C. Davis, Director General of Railroads, as Agent designated by the President, and in subjecting said Jams C. Davis, as such agent, to its jurisdiction and in rendering and entering judgment against him, as such Agent, and the said Appellate Division erred in sustaining [fol. 207] said action and in affirming said judgment.

5. That the Supreme Court of the State of New York erred in granting plaintiff's motion, made upon the trial, to amend the complaint to the extent of alleging that James C. Davis is the agent designated by the President under the Federad Transportation Act, and the said Appellate Division erred in sustaining such ruling.

6. That the Supreme Court of the State of New York erred in denying the defendant's motions, made at the close of the plaintiff's case, and at the close of the whole case, to dismiss the complaint upon the grounds that the action was not commenced and was not pending against the proper defendant, and the proper defendant was not a party to this action, at any time within two years from the date of the passage of the Act of the Congress of the United States, known as the Transportation Act, 1920, or at any time within twelve months after the resignation of Walker D. Hines or his successor, John Barton Payne, as Director General of Railroads and as agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, or at any time within three years after the accrual of the alleged cause of action set forth in the amended complaint, and said Appellate Division erred in sustaining such rulings.

7. That the Supreme Court of the State of New York erred in denying defendant's motion to set aside the verdict upon the exception taken at the trial, and the said Appellate Division erred in sustaining such ruling.

8. That the Supreme Court of the State of New York and said Appellate Division erred in deciding and holding that this action was properly commenced within the period [fol. 208] of limitation prescribed and was pending when subdivision (h) of the Act of Congress, entitled "An Act to amend section 206 of the Transportation Act, 1920", approved March 3, 1923 (42 Stat. 1443) took effect.

9. That the Supreme Court of the State of New York and said Appellate Division erred in deciding and holding that this action had been abated or dismissed solely because of the provisions of the Act of Congress entitled "An Act to prevent the abatement of certain actions," approved February 8, 1899 (30 Stat. 822).

10. That the Supreme Court of the State of New York and said Appellate Division erred in deciding and holding that the agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, could be substituted more than two years after the passage of the Transportation Act, 1920, and more than three years after the accrual of the alleged cause of action herein, and more than twelve months after the resignation of Walker D. Hines and of his successor John Barton Payne as Director General of Railroads and as the agent provided for in Section 206 of the Transportation Act, 1920, in an action wherein "Walker D. Hines, as agent designated by the President (Lehigh Valley Railroad)" was named as defendant, which was commenced after Walker D. Hines had resigned as and ceased to be the Director General of Railroads and the agent provided for in Section 206 of the Transportation Act, 1920.

11. That the Supreme Court of the State of New York and said Appellate Division erred in deciding and holding that certain statutes of the State of New York, namely Sections 83 and 192 of the Civil Practice Act (Laws 1920, [fol. 209] chapter 925) are not repugnant to the laws of the United States and are valid.

12. That the Supreme Court of the State of New York and said Appellate Division erred in deciding and holding that the alleged cause of action herein could be enforced against the United States of America and the agent provided for in Section 206 of the Transportation Act, 1920, although an action thereon was not commenced within the time and in the manner provided by law.

13. That the Supreme Court of the State of New York, and said Appellate Division, erred in deciding and holding that Section 206 of the Transportation Act, 1920, is invalid in so far as it permits actions at law, based on causes of action arising out of the possession, use or operation by the President of the railroad or system of transportation of any carrier of such a character as prior to Federal control could have been brought against such carrier, to be brought only against the agent designated by the President as provided in said Act.

14. That the Supreme Court of the State of New York and said Appellate Division erred in deciding and holding that Section 206 of the Transportation Act, 1920, was invalid in so far as it provides that actions described therein can be brought only within the time prescribed by state statute and not later than two years from the date of the passage of said Transportation Act, 1920.

15. That the Supreme Court of the State of New York and said Appellate Division erred in deciding and holding that the Act of Congress entitled "An Act to prevent the abatement of certain actions", approved February 8, 1899 [fol. 210] (30 Stat. 822) is invalid in so far as it provides, as to actions commenced after the termination of Federal control arising out of the possession, use or operation by the President of the railroad or system of transportation of a carrier, that only those actions which were lawfully commenced shall not abate by reason of the retirement or resignation of the agent provided for in Section 206 of the Transportation Act, 1920, and in so far as it limits to such actions the authority and jurisdiction of the court to allow the action to be maintained against the successor in office of such agent, and in so far as it limits the time within which a motion or supplemental petition to be allowed to maintain such action against the successor in office of such agent may

be filed to twelve months after the retirement or resignation of such agent.

16. That the Supreme Court of the State of New York and said Appellate Division erred in deciding and holding that the Act of Congress entitled "An Act to amend section 206 of the Transportation Act, 1920," approved March 3, 1923 (42 Stat. 1443) is invalid as to actions described in subdivision (a) of Section 206 of the Transportation Act, 1920, in so far as it limits the application of said amendatory act to actions which were properly commenced within the period of limitation prescribed and to actions of the character described in subdivision (h) which have been abated or dismissed solely because of the provisions of the said act entitled "An Act to prevent the abatement of certain actions," approved February 8, 1899.

Wherefore the said Andrew W. Mellon, Director General of Railroads, as agent designated by the President [fols. 211 & 211½] pursuant to Section 206 of the Transportation Act, 1920, the defendant, prays that the order made herein by the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department on the 18th day of December, 1924, affirming the judgment rendered herein by the Supreme Court of the State of New York, and entered in the office of the Clerk of the County of New York on the 8th day of March, 1924, and the judgment of affirmance entered on said order in the office of the Clerk of the County of New York on the 3rd day of February, 1926, and the judgment rendered herein by the Supreme Court of the State of New York and entered in the office of the Clerk of the County of New York on the 8th day of March, 1923, for the errors aforesaid and for the other errors in the record and proceedings aforesaid, may be reversed and annulled and altogether held for nothing and that he, the said defendant, may be restored to all things which he has lost by occasion thereof.

Dated New York, April 23, 1926.

Clifton P. Williamson, Counsel for the Defendant, Andrew W. Mellon, Director General of Railroads, as Agent Designated by the President Pursuant to Section 206 of the Transportation Act, 1920.

Office & P. O. address: No. 120 Broadway Borough of Manhattan, city of New York, N. Y.

[fol. 212] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[Title omitted]

PETITION FOR WRIT OF ERROR

Now comes Andrew W. Mellon, Director General of Railroads, as Agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, the defendant herein, and says:

That on or about the 3rd day of February, 1926, a judgment herein was entered in the office of the Clerk of the County of New York upon an order of the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, made by said Court on the 18th day of December, 1925, affirming a judgment of the Supreme Court of the State of New York held in and for New York County made and entered in the office of the Clerk of the County of New York on or about the 8th day of March, 1924, in favor of the plaintiff and against James C. Davis, as Agent designated by the President, for One thousand one hundred twenty-two and 34/100 ($1,122.34) Dollars, and for One hundred twelve and 70/100 ($112.70) Dollars as costs, in which judgment and proceedings had prior thereto in this cause certain errors were committed [fol. 213] to the prejudice of the defendant, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

That after the rendition of said judgment of March 8, 1924, and the making of said order of December 18, 1925, Andrew W. Mellon, Director General of Railroads, as agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, was substituted as defendant herein in the place and stead of James C. Davis, Director General of Railroads, as Agent designated by the President, by an order made herein and entered in the office of the Clerk of the County of New York on the 11th day of January, 1926, and thereafter said Andrew W. Mellon, Director General of Railroads, as Agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, duly applied to said Appellate Division, for leave to appeal to the Court of Appeals of the

State of New York, which application was refused by said Appellate Division by an order made herein on the 29th day of January, 1926. That a copy of said order with notice of entry thereof was served upon the attorneys for the defendant on the 9th day of February, 1926, and thereafter and within thirty days the defendant duly moved, by notice of motion served on the attorneys for the plaintiff on March 3, 1926, returnable on March 8, 1926, in the Court of Appeals for leave to appeal from said order of said Appellate Division of December 18, 1925, and said judgment of February 3, 1926, entered thereon, affirming said judgment of March 8, 1924, and for leave to bring up for review upon said appeal the order made herein on October 31, 1923, reinstating the [fol. 214] cause of action and substituting James C. Davis, Director General of Railroads, as agent designated by the President, as party defendant in the place and stead of Walker D. Hines, the order of said Appellate Division of January 18, 1924, affirming said order of October 31, 1923, and the order made herein on February 23, 1924, denying the defendant's motion for leave to serve and file a supplemental answer herein.

That said motion was denied by the Court of Appeals by an order made herein on the 6th day of April, 1926.

Wherefore the defendant prays that a writ of error may issue in this behalf to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department and to the Supreme Court of the State of New York held in and for the County of New York, for the correction of the errors so complained of, and that a transcript of the records, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and the defendant will ever pray.

Dated New York, April 23, 1926.

Clifton P. Williamson, Counsel for the Defendant, Andrew W. Mellon, Director General of Railroads, as Agent Designated by the President Pursuant to Section 206 of the Transportation Act, 1920.

Office & P. O. address: No. 120 Broadway, Borough of Manhattan, City of New York, N. Y.

[fols. 215 & 215½] *Duly sworn to by Clifton P. Williamson. Jurat omitted in printing.*

[fols. 216-218] Bond on writ of error for $250, approved and filed, omitted in printing.

[fols. 219 & 219½] In Court of Appeals of New York

Thomas E. O'Neil, Respondent,

vs.

Andrew W. Mellon, Director General, &c., Appellant

Order Denying Motion for Appeal—April 6, 1926

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A copy.

John Ludden, Deputy Clerk. (Seal.)

[fol. 220] Citation, in usual form, showing service on Olcott, Olcott & Glass, omitted in printing.

[fol. 221] In Supreme Court of New York

Writ of Error—Filed May 28, 1926

United States of America, ss:

The President of the United States of America to the Judges of the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department and the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme

Court of the State of New York, before you, or some of you, between Thomas E. O'Neil, plaintiff, and Andrew W. Mellon, Director General of Railroads, as agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, defendant, a manifest error hath happened, to the great damage of said Andrew W. Mellon, Director General of Railroads, as agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 31st day of May, 1926, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law [fol. 222] and customs of the United States ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 1st day of May, in the year of Our Lord one thousand nine hundred and twenty-six, and of the Independence of the United States the one hundred and fiftieth.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States. (Seal of the Supreme Court of the United States.)

The aforegoing writ is hereby allowed.
Dated New York, N. Y., May 1, 1926.

Harlan F. Stone.

[fols. 222½-224½] [File endorsement omitted]

[fol. 225] Return to writ of error omitted in printing.

[fol. 226] Copy received Jun. 8, 1926.
Olcott, Olcott & Glass, Attorneys for Def. in Error.

Due service of a copy of the within Statement is hereby admitted.

Dated N. Y., June 8/26.

Olcott, Olcott & Glass, Attys. for Def. in Error.

IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE POINTS TO BE RELIED UPON AND DESIGNATION BY PLAINTIFF IN ERROR OF PARTS OF THE RECORD TO BE PRINTED—Filed June 10, 1926

[fol. 227] The points on which the plaintiff-in-error intends to rely and the designation of the parts of the record which plaintiff-in-error thinks necessary for the consideration thereof, made pursuant to Paragraph 9 of Rule 11 of the Revised Rules of the Supreme Court of the United States, are as follows:

I

Points on Which the Plaintiff in Error Intends to Rely

1. The attempted substitution of James C. Davis, Director General of Railroads, as Agent designated by the President as party defendant in this action, in the place and stead of Walker D. Hines, was in effect the commencement of an action against the United States, and was contrary to law and void.

2. An action based upon a cause of action arising out of the possession, use or operation by the President of the [fol. 228] railroads or systems of transportation of a carrier must conform strictly to the conditions imposed by Congress permitting such an action to be brought.

3. An action, commenced after the resignation of Walker D. Hines as the agent provided for in Section 206 of the Transportation Act, 1920, wherein the defendant named was "Walker D. Hines, as agent designated by the Presi-

dent (Lehigh Valley Railroad)" was not an action brought against the agent provided for in Section 206 of the Transportation Act, 1920.

4. This action was not "lawfully commenced" within the meaning of the Act of February 8, 1899 (30 Stat. 822) or "properly commenced within the period of limitation prescribed, and pending at the time" the Act of March 3, 1923 (42 Stat. 1443) took effect, within the meaning of subdivision (h) of that Act, and was not of the character described in said subdivision.

5. This action was not brought within the time nor in the manner provided by law.

6. The New York Supreme Court had no jurisdiction of a cause of action arising out of the possession use or operation by the President of the railroads or systems of transportation of a carrier upon which an action was not commenced prior to February 28, 1922, against the agent provided for in Section 206 of the Transportation Act, 1920.

[fol. 229] 7. This action, as against the agent provided for in Section 206 of the Transportation Act, 1920, was not commenced within two years after the passage of the Transportation Act, 1920, and therefore was barred.

8. The New York Supreme Court had no jurisdiction of a cause of action arising out of the possession use or operation by the President of the railroads or system of transportation of a carrier upon which an action was not commenced against the agent provided for in Section 206 of the Transportation Act, 1920, within the period of limitation prescribed by state statute, in this case, within three years after the cause of action accrued.

9. This action, as against the agent provided for in Section 206 of the Transportation Act, 1920, was not commenced within three years after the cause of action sued upon herein accrued, and therefore was barred.

10. Walker D. Hines was not the agent provided for in Section 206 of the Transportation Act, 1920, after May 18, 1920, and was not the person against whom actions described in Section 206 of the Transportation Act, 1920, were required by that section to be brought at the time the summons herein was attempted to be served.

11. No substitution of the agent provided for in Section 206 of the Transportation Act, 1920, is permissible except in an action which was lawfully commenced and in which [fol. 230] a motion therefor is made within twelve months after the retirement or resignation of the agent or in an action properly commenced within the period of limitation prescribed and pending on March 3, 1923, or in an action of the character described in subdivision (h) of the Act of March 3, 1923, which has been abated or dismissed solely because of the provisions of the Act of February 8, 1899, and in which a motion for reinstatement was filed prior to March 3, 1924; and this is not such an action.

12. The conditions and limitations under which the United States may be sued cannot be waived.

13. The New York Supreme Court in this action had no jurisdiction of the agent provided for in Section 206 of the Transportation Act, 1920.

14. The New York Supreme Court never acquired jurisdiction of this cause of action.

15. The provisions of the New York Civil Practice Act relating to amendment of process and substitution of parties (Civil Practice Act §§83, 192; Laws of 1920 Chap. 925), as construed and applied in this action, are contrary to the laws of the United States, and are not valid.

16. Section 206 of the Transportation Act, 1920, in so far as it permits actions at law, based on causes of action arising out of the possession, use or operation by the President of the railroads or system of transportation of any carrier of such a character as prior to Federal control could [fol. 231] have been brought against such carrier, to be brought only against the agent designated by the President as provided in said Act within the time prescribed by state statute and not later than two years from the passage of the Transportation Act, 1920, is valid and controlling in this action.

17. That the Act of Congress, entitled "An Act to prevent the abatement of certain actions," approved February 8, 1899, is valid and controlling in this action in so far as it provides, as to actions commenced after the termination of Federal control arising out of the possession, use or opera-

tion by the president of the railroads or system of transportation of a carrier, that only those actions which were lawfully commenced shall not abate by reason of the retirement or resignation of the agent provided for in Section 206 of the Transportation Act, 1920, and in so far as it limits to such actions the authority and jurisdiction of the court to allow the action to be maintained against the successor in office of such agent, and in so far as it limits the time within which a motion or supplemental petition to be allowed to maintain such action against the successor in office of such agent may be filed to twelve months after the retirement or resignation of such agent.

18. That the Act of Congress entitled "An Act to amend section 206 of the Transportation Act, 1920," approved March 3, 1923, is valid as to actions described in subdivision [fol. 232] (a) of Section 206 of the Transportation Act, 1920, in so far as it limits the application of said amendatory act to actions which were properly commenced within the period of limitation prescribed and to actions of the character described in subdivision (h) which have been abated or dismissed solely because of the provisions of the Act of Congress entitled "An act to prevent the abatement of certain actions," approved February 8, 1899.

II

The Parts of the Record Which Plaintiff in Error Thinks Necessary for the Consideration of said Points

1. Statement Under Rule 234 (Case on appeal pp. 1-2).
2. Amended Notice of Appeal (Case on appeal pp. 5-7).
3. Summons, including title (Case on appeal p. 8).
4. Affidavit of Bernard E. Perelson (Case on appeal, p. 9).
5. Notice of Appearance (Case on appeal, p. 10).
6. Complaint (Case on appeal pp. 11-14).
7. Notice of Motion, dated August 20, 1920 (Case on appeal, pp. 15-16).
8. Affidavit of Clifton P. Williamson (Case on appeal p. 17).
9. Amended Complaint (Case on appeal pp. 18-21).
10. Answer (Case on appeal pp. 22-23).

11. Notice of Motion, dated August 20, 1923 (Case on appeal p. 25).

[fol. 233] 12. Affidavit of Walter A. Lynch (Case on appeal pp. 26-28).

13. Order made October 31, 1923 (Case on appeai pp. 29-30).

14. Notice of Appeal, including subscription (Case on appeal pp. 31-32).

15. Order of Affirmance, made January 18, 1924 (Case on appeal p. 33).

16. Order to Show Cause, dated February 4, 1924 (Case on appeal pp. 34-35).

17. Affidavit of Clifton P. Williamson (Case on appeal pp. 35-38).

18. Proposed supplemental answer (Case on appeal pp. 38-40).

19. Order made February 23, 1924 (Case on appeal p. 42).

20. Judgment, dated March 8, 1924 (Case on appeal p. 44).

21. Following portions of the Case:

(a) From words "Before: Hon. Charles D. Donohue Justice and a jury," folio 164 page 55, to words "The jury was duly empaneled and sworn," folio 179, page 60.

(b) From words "Mr. Lynch: That is all," folio 350 page 117 to words "I will deny your motion and grant you an exception," folio 355, page 119.

(c) From words "Testimony closed," folio 505, page 169, to words "Motion denied. Exception for the defendant," folio 505, page 169.

[fol. 234] (d) From words "New York, March 5, 1924," folio 580, page 194, to words "Motion denied. Exception for the defendant," folio 581, page 194.

22. Order of Affirmance of Appellate Division, First Department, dated December 18, 1925.

23. Judgment of Affirmance entered in the office of the Clerk of New York County on the 3rd day of January, 1926.

24. Order dated and entered in the office of the Clerk of New York County on the 11th day of January, 1926, substituting Andrew W. Mellon, Director General of Railroads as Agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, as party defendant herein.

25. Order of the Appellate Division, First Department, denying defendant's motion for leave to appeal to Court of Appeals, dated January 29, 1926.

26. Order of the Court of Appeals, denying defendant's motion for leave to appeal, dated April 6, 1926.

27. Defendant's Assignment of Errors, dated April 23, 1926.

28. Defendant's Petition for Writ of Error, dated April 23, 1926, and verification thereof made April 23, 1926.

29. Undertaking for costs, dated April 24, 1926, with notation of approval thereof of Associate Justice Harlan F. [fol. 235] Stone.

30. Writ of Error, with notation of allowance thereof of Associate Justice Harlan F. Stone.

31. Citation on Writ of Error, and admission of the attorneys for plaintiff of receipt of a copy thereof endorsed on the back thereof.

32. Return of William T. Collins, Clerk of the County of New York, to Writ of Error, dated May 28, 1926.

33. This statement of the points intended to be relied upon and designation of the parts of the record to be printed.

Dated New York, June 8th, 1926.

Clifton P. Williamson, Counsel for Plaintiff in Error.

[fol. 236] [File endorsement omitted.]

[fol. 237] [Endorsed:] New York Supreme Court, New York County. Thomas E. O'Neil, Plaintiff, against Andrew W. Mellon, Director General of Railroads, as agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, defendant. Return to writ of error. Alexander & Green, 120 Broadway, Borough of Manhattan, New York City, N. Y., Attorneys for Defendant.

Endorsed on cover: File No. 31,985. New York Supreme Court. Term No. 418. Andrew W. Mellon, Director General of Railroads, as agent designated by the President, etc., plaintiff in error, vs. Thomas E. O'Neil. Filed June 1st, 1926. File No. 31,985.

FILED
MAY 3 1927
WM. R. STANSBURY

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926.

No. [redacted] 74

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT DESIGNATED BY THE PRESIDENT PURSUANT TO SECTION 206 OF THE TRANSPORTATION ACT, 1920,

Plaintiff-in-Error,

against

THOMAS O'NEIL,

Defendant-in-Error.

BRIEF OF PLAINTIFF-IN-ERROR ON WRIT OF ERROR TO THE JUDGES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST JUDICIAL DEPARTMENT AND THE JUDGES OF THE SUPREME COURT OF THE STATE OF NEW YORK.

The Stewart Press, Inc., Printers' Guild, Inc., 114 Fulton St., New York, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 418.

ANDREW W. MELLON, Director General of Railroads, as Agent designated by the President pursuant to Section 206 of the Transportation Act, 1920,
Plaintiff-in-Error,

AGAINST

THOMAS E. O'NEIL,
Defendant-in-Error.

BRIEF OF PLAINTIFF-IN-ERROR ON WRIT OF ERROR TO THE JUDGES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST JUDICIAL DEPARTMENT AND THE JUDGES OF THE SUPREME COURT OF THE STATE OF NEW YORK.

Official Report of Opinions Below.

No opinion was rendered below, but the decision of the Appellate Division of the Supreme Court for the First Judicial Department affirming the order reinstating the cause of action and substituting James C. Davis, the Director-General of Railroads, as agent designated by the President in place and stead of Walker D. Hines as party defendant

is reported in 208 New York Appellate Division Reports 721; the decision of the said Appellate Division affirming the judgment is reported in 215 New York Appellate Division Reports 766; the decision of the said Appellate Division denying the motion for leave to appeal to the Court of Appeals is reported in 215 New York Appellate Division Reports 813; and the decision of the Court of Appeals denying the motion for leave to appeal is not reported.

Grounds of Jurisdiction of the Supreme Court.

(1) The date of the judgment of the New York Supreme Court is March 8, 1924 (R. 22); of the order of affirmance of the Appellate Division is December 16, 1925 (R. 28-29); and of the judgment of affirmance is January 11, 1926 (R. 29-30).

The date of the order of the New York Supreme Court substituting James C. Davis, Director General, etc., as Agent, etc., as party defendant is October 31, 1923 (R. 14-15) and of the order of the Appellate Division affirming said order of substitution is January 18, 1924 (R. 16).

(2) The specific claims advanced and rulings made in the lower Court which are relied upon as the basis of this Court's jurisdiction are as follows:

It was claimed that the action as originally commenced on June 17, 1920, by the service of a summons on Guy E. Jackson, wherein the defendant named was "Walker D. Hines, as Agent Designated by the President (Lehigh Valley Railroad)", which was after Walker D. Hines had resigned as, and while John Barton Payne was, the agent appointed by the President pursuant to the provisions of Section 206 of the Transportation Act, 1920, was not the commencement of an action arising out of Federal control of railroads in the manner prescribed by the various statutes permitting such actions to be brought and maintained, and that the

so-called reinstatement of the cause of action and substitution of James C. Davis, Director General of Railroads, as agent designated by the President on October 31, 1923, was in effect an attempted commencement of an action against the United States through its agent for which there is no warrant or authority of law.

Over the objection of James C. Davis, appearing specially in opposition to plaintiff's motion to reinstate the cause of action and substitute "James C. Davis, the Director General of Railroads" as party defendant in the place and stead of Walker D. Hines, the New York Supreme Court, on October 31, 1923, made and entered an order reinstating the cause of action and substituting "James C. Davis, Director General of Railroads, as agent designated by the President" in place and stead of Walker D. Hines as party defendant (R. 12-15).

From such order, James C. Davis, Director General of Railroads, as agent designated by the President, appearing specially for the purpose of appeal only, appealed to the Appellate Division of the Supreme Court of the State of New York, First Department, which affirmed said order (R. 15-16).

Thereafter the defendant, James C. Davis, Director General of Railroads, as agent appointed by the President, appearing only because he was compelled to do so by the said order of October 31, 1923, and the order of affirmance thereof, and reserving his objection to his substitution as defendant and to the jurisdiction of the Court to entertain and proceed with the action (R. 18, 20), moved for leave to serve and file a supplemental answer setting up three separate defenses as follows: (1) that the action was not commenced and was not pending at any time against the agent desigated by the President pursuant to Section 206 of the Transportation Act, 1920, within two years from the date of the passage of said act; (2) that the action was not commenced and was not pending at any time against such agent within three years after the accrual of the alleged cause of action; and (3) that

no substitution was effected within twelve months after the resignation of Walker D. Hines or of John Barton Payne as Directors General of Railroads and as the agents designated by the President pursuant to Section 206 of the Transportation Act, 1920 (R. 17-21). The motion was denied by an order entered on February 23, 1924 (R. 21). The motion was renewed at the commencement of the trial, which motion was denied (R. 25-26). Exception was taken to granting the plaintiff's motion, at the commencement of the trial, to amend the complaint to allege that James C. Davis is the agent designated by the President under the Federal Transportation Act (R. 27). Thereafter and at the conclusion of the plaintiff's case, the motion for leave to file the supplemental answer was renewed and denied (R. 28).

The objection to the jurisdiction of the Court to entertain and proceed with the action and to the jurisdiction of the Court over the defendant was renewed and overruled by the Court at the commencement of the trial (R. 23-25), at the conclusion of the plaintiff's case (R. 27); at the conclusion of the whole case (R. 28) and on the motion to set aside the verdict (R. 28).

The rulings of the New York Supreme Court were sustained on appeal to the Appellate Division by an order affirming the judgment entered December 18, 1925 (R. 28-29), upon which judgment of affirmance was entered on February 3, 1926 (R. 30-32).

Leave to appeal to the Court of Appeals was denied by the Appellate Division by an order entered on January 29, 1926 (R. 32) and by the Court of Appeals by an order entered on April 6, 1926 (R. 40).

(3) The statutory provision under which the jurisdiction of this Court is invoked is The Judicial Code, Section 237.

(4) The following case is believed to sustain the jurisdiction:

Davis v. *Cohen Co.*, 268 U. S. 638;

Statement of the Case.

On ~~July~~ June 17, 1920, a summons naming as defendant "Walker D. Hines, as Agent Designated by the President (Lehigh Valley Railroad)" (R. 4) was served on Guy E. Jackson (R. 5). On July 6, 1920 (R. 1) a notice of appearance and demand for a copy of the complaint (R. 4*b*) was served on the attorneys for the plaintiff, who thereafter and on July 23, 1920 (R. 1), served upon the attorneys for the defendant a complaint (R. 4*b*-6) alleging that the defendant

> "is a foreign corporation, organized and existing under the laws of the State of Pennsylvania and up to or about March 1st, 1920, the said defendant, Lehigh Valley Railroad was under Federal control and management, through the agency of Walker D. Hines, the Director General of Railroads, or his predecessor in office, and by General Order No. 50, made and issued pursuant to law by the said Director General, it was ordered and directed in substance that suits and litigation growing out of matters arising out of or during Federal control of the said railroads should be brought against the said Director General of Railroads, or his successor in office, and by the Federal Transportation Act of 1920, it was provided that suits and litigation growing out of said Federal control should be brought against the Agent designated by the President; and the President has, by proclamation, duly designated the present Director General of Railroads, Walker D. Hines, or his successor in office, to be such agent" (R. 4-5).

The complaint then alleged facts constituting a cause of action against a common carrier of passengers for damages for personal injuries sustained by the plaintiff while a passenger on a train of such carrier on February 22, 1920, reference being made in the Sixth paragraph to "the defendant company", and demanded judgment (not stating against what person or company) for $15,000 (R. 5-6).

The attorneys for the defendant then served a notice of motion, returnable on August 26, 1920, for an order (1)

striking out of the complaint references to the Lehigh Valley Railroad Company as the defendant on the ground that they were irrelevant to the alleged cause of action, or (2) requiring the complaint be made more definite and certain by stating from what person and the capacity of such person, if any, or against what corporation plaintiff demands judgment (R. 7-8).

At the time the plaintiff sustained injury, namely, on February 22, 1920, the railroads were under Federal control, which terminated March 1, 1920 (Transportation Act 1920, Section 200; 41 Stat. 456), and Walker D. Hines was Director General of Railroads (Proclamation Jan. 10, 1919; 40 U. S. Stat., Part II, p. 1922). After the passage of the Transportation Act, 1920, and the termination of Federal Control, Walker D. Hines was also appointed the agent under Section 206 (Proclamation March 11, 1920; 41 U. S. Stat., Part II, p. 1789). He resigned and was succeeded as Director General and as agent under Section 206 on May 18, 1920, by John Barton Payne, who at the time the action was commenced was the agent designated by the President under Section 206 of the Transportation Act, 1920 (Proclamation, May 14, 1920; 41 U. S. Stat. 1794).

Before the return day of the motion to compel an amendment of the complaint, namely, on August 24, 1920 (R. 1), an amended complaint, omitting reference to the Lehigh Valley Railroad Company as defendant, and demanding judgment against "the defendant, Walker D. Hines, as Agent designated by the President", but otherwise the same as the original complaint, was served (R. 8-10).

On September 16, 1920 (R. 1), an answer to the amended complaint was served, specifically denying that Walker D. Hines was the present Director General of Railroads (R. 11).

The action appeared on the calendar and on February 13, 1923, was marked "abated", no one appearing on behalf of the plaintiff (R. 13). Thereafter, the notice of motion for an order "reinstating" the cause of action and substi-

tuting James C. Davis, the Director General of Railroads, as a party defendant in the place and stead of Walker D. Hines, was served on Alexander & Green, "Attorneys for Walker D. Hines", and Evan Shelby, regional counsel for the Director General of Railroads, as "attorney for James C. Davis, Lehigh Valley Railroad" (R. 12-14). The motion was opposed on behalf of James C. Davis, appearing specially for that purpose, but was granted by order entered on October 31, 1923 (R. 14-15) from which an appeal on behalf of James C. Davis, Director General of Railroads, as agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, appearing specially for the purpose of said appeal only, was taken to the Appellate Division (R. 15-16). The order was affirmed by the Appellate Division by an order entered on January 18, 1924 (R. 16).

Thereafter, and on February 4, 1924, James C. Davis, Director General of Railroads, as agent designated by the President pursuant to section 206 of the Transportation Act, 1920, reserving his objection to the substitution of himself as defendant and to the jurisdiction of the Court to entertain and proceed with the action, and appearing only because he was compelled to do so by the order of October 31, 1923, and the order of affirmance thereof of January 18, 1924, procured an order, returnable on February 6, 1924, requiring the plaintiff to show cause why an order should not be made allowing the defendant to serve and file a supplemental answer setting up three separate defenses: (1) that the action was not commenced and was not pending at any time against the agent designated by the President pursuant to section 206 of the Transportation Act, 1920, within two years from the date of passage of said act; and (2) within three years after the accrual of the cause of action; and (3) that no substitution was effected within twelve months after the resignation of Walker D. Hines or of John Barton Payne as Director General of Railroads and as agent designated by the President pursuant to section 206 of the

Transportation Act, 1920 (R. 17-21). The motion was denied by an order made on February 6, 1924 (R. 21).

The action then came on for trial on March 4, 1924, at the commencement of which objection to the jurisdiction of the court to entertain and proceed with the action and to the jurisdiction of the court over the defendant and a motion to dismiss the complaint were made by the defendant (R. 23-24), and denied by the Court (R. 25). The grounds of such objection and motion were as set forth in the separate defenses set out in the proposed supplemental answer (R. 23-24).

A motion was then made by defendant for leave to renew the motion to file the supplemental answer and was denied by the Court (R. 25-26). The Court then granted plaintiff's motion to amend the complaint to allege that James C. Davis is the agent designated by the President under the Federal Transportation Law, with exception to the defendant (R. 25).

At the close of the plaintiff's case, the defendant moved to dismiss the complaint upon the grounds that the action was not commenced and was not pending against the defendant named, and that such defendant was not a party to the action, at any time within two years from the date of passage of the Transportation Act, 1920, or at any time within twelve months after the resignation of Walker D. Hines or his successor as Director General of Railroads and as agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, or at any time within three years after the accrual of the cause of action, and upon the grounds that plaintiff had failed to prove the cause of action alleged in the complaint or any cause of action against the then defendant (R. 27).

The motion was denied (R. 27), and exception noted (R. 28).

The defendant then renewed the motion for leave to file the supplemental answer, which was denied and an exception noted (R. 28).

At the close of the whole case, the motion to dismiss on the grounds previously stated was renewed and denied, and exception noted (R. 28). After the rendition of the verdict, in favor of the plaintiff for $1000, a motion to set it aside upon the same grounds was made and denied and an exception noted (R. 28).

A judgment was entered on March 8, 1924, in favor of the plaintiff against "James C. Davies, as agent designated by the President" for the amount of the verdict and costs (R. 22) from which the defendant appealed to the Appellate Division, First Department, bringing up for review, among others, the order substituting James C. Davis, Director General of Railroads as Agent designated by the President as defendant, and the order of affirmation thereof and the order denying the defendant's motion for leave to serve and file the supplemental answer (R. 2-3). The Appellate Division affirmed the judgment and orders except as to the order relating to substitution of the defendant, as to which the appeal was dismissed (R. 28-29).

The order of affirmance was entered on December 18, 1925 (R. 28). James C. Davies resigned as Director General of Railroads and as Agent designated by the President under Section 206 of the Transportation Act, 1920, and was succeeded by Andrew W. Mellon, on December 31, 1925 (Proclamation December 14, 1925; Appendix, p. 40). By an order entered January 11, 1926, Andrew W. Mellon, Director General of Railroads, as Agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, was substituted as defendant in the place and stead of James C. Davis, Director General of Railroads, as Agent designated by the President (R. 29-30), and moved in the Appellate Division for leave to appeal from its order of December 18, 1925, to the Court of Appeals, which motion was denied by an order entered on January 29, 1926 (R. 32). The defendant then moved in the Court of Appeals for leave to appeal to that Court, which motion was denied by an order entered on April 6, 1926 (R. 40).

The judgment of affirmance was entered on February 3, 1926 (R. 30-32).

This writ of error (R. 40-41), duly allowed by Mr. Justice Harlan F. Stone, was sued out on May 1, 1926, on instructions of the General Solicitor of the United States Railroad Administration, because it was deemed that questions of importance in closing out claims arising out of Federal Control were involved, including the right of the various officials to authorize and pay judgments obtained under the circumstances of this case.

Specification of Assigned Errors Intended to be Urged.

1. That the Supreme Court of the State of New York erred in ordering that the cause of action herein be reinstated and that James C. Davis, Director General of Railroads, as Agent designated by the President be substituted as party defendant in the place and stead of Walker D. Hines, and the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department erred in affirming said order (R. 33).

2. That the Supreme Court of the State of New York erred in overruling the objection of James C. Davis, Director General of Railroads, as Agent designated by the President, to the jurisdiction of said Court to entertain and proceed with this cause and to the jurisdiction of said court over James C. Davis, Director General of Railroads, as Agent designated by the President and the said Appellate Division erred in sustaining such ruling (R. 33).

3. That the Supreme Court of the State of New York erred in denying defendant's motion for leave to serve and file a supplemental answer, setting up as defenses to this

action that the action was not commenced and was not pending against the proper defendant and the proper defendant was not a party to said action at any time within two years from the date of the passage of the Act of the Congress of the United States, known as the Transportation Act, 1920, or at any time within twelve months after the resignation of Walker D. Hines, or of his successor John Barton Payne as Director General of Railroads and as Agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, or at any time within three years after the accrual of the alleged cause of action set forth in the complaint; and said Appellate Division erred in sustaining and affirming said ruling (R. 33-34).

4. That the Supreme Court of the State of New York erred in entertaining and proceeding with this action as against James C. Davis, Director General of Railroads, as Agent designated by the President, and in subjecting said James C. Davis, as such agent, to its jurisdiction and in rendering and entering judgment against him, as such Agent, and the said Appellate Division erred in sustaining said action and in affirming said judgment (R. 34).

5. That the Supreme Court of the State of New York erred in granting plaintiff's motion, made upon the trial, to amend the complaint to the extent of alleging that James C. Davis is the agent designated by the President under the Federal Transportation Act, and the said Appellate Division erred in sustaining such ruling (R. 34).

6. That the Supreme Court of the State of New York erred in denying the defendant's motions, made at the close of the plaintiff's case, and at the close of the whole case, to dismiss the complaint upon the grounds that the action was not commenced and was not pending against the proper

defendant, and the proper defendant was not a party to this action, at any time within two years from the date of the passage of the Act of the Congress of the United States, known as the Transportation Act, 1920, or at any time within twelve months after the resignation of Walker D. Hines or his successor, John Barton Payne, as Director General of Railroads and as agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, or at any time within three years after the accrual of the alleged cause of action set forth in the amended complaint, and said Appellate Division erred in sustaining such rulings (R. 34).

8. That the Supreme Court of the State of New York and said Appellate Division erred in deciding and holding that this action was properly commenced within the period of limitation prescribed and was pending when subdivision (*h*) of the Act of Congress, entitled "An Act to amend section 206 of the Transportation Act, 1920", approved March 3, 1923 (42 Stat. 1443), took effect (R. 35).

10. That the Supreme Court of the State of New York and said Appellate Division erred in deciding and holding that the agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, could be substituted more than two years after the passage of the Transportation Act, 1920, and more than three years after the accrual of the alleged cause of action herein, and more than twelve months after the resignation of Walker D. Hines and of his successor, John Barton Payne, as Director General of Railroads and as the agent provided for in Section 206 of the Transportation Act, 1920, in an action wherein "Walker D. Hines, as agent designated by the President (Lehigh Valley Railroad)" was named as defendant, which was commenced after Walker D. Hines had re-

signed as and ceased to be the Director General of Railroads and the agent provided for in Section 206 of the Transportation Act, 1920 (R. 35).

11. That the Supreme Court of the State of New York and said Appellate Division erred in deciding and holding that certain statutes of the State of New York, namely Sections 83 and 192 of the Civil Practice Act (Laws 1920, chapter 925) are not repugnant to the laws of the United States and are valid (R. 35).

12. That the Supreme Court of the State of New York and said Appellate Division erred in deciding and holding that the alleged cause of action herein could be enforced against the United States of America and the agent provided for in Section 206 of the Transportation Act, 1920, although an action thereon was not commenced within the time and in the manner provided by law (R. 36).

Summary.

I. An action to recover damages for personal injuries caused by the negligent operation of a railroad during Federal Control can be maintained only in strict conformity with the conditions imposed by Congress.

(*a*) Such an action is in effect an action against the United States of America.

(*b*) The United States of America, being a sovereign government, is immune from suit, except in so far as it consents to be sued.

(*c*) Such consent can be given only by a duly enacted law.

(*d*) Any conditions or requirements for the maintenance of suit may be imposed by law and such conditions or requirements must be strictly and literally enforced and cannot be waived by any agent or official of the government.

II. The Transportation Act, 1920, which is the only authority permitting such an action, commenced after the termination of Federal Control, provides that such an action must "be brought against an agent designated by the President for such purpose" within the period of limitation prescribed by state or federal statutes but not later than two years from the date of passage of said Act.

III. An action in which the defendant is named as "Walker D. Hines, as Agent designated by the President (Lehigh Valley Railroad)", commenced after the resignation of Walker D. Hines and the appointment of John Barton Payne, as such Agent, is not brought in

conformity with said Act, and does not subject the United States to suit.

(*a*) The Act requires that the action must be brought against the Agent in office at the time the action is commenced.

1. Such an action is an action against the head of a department of business of the government.

2. Upon the resignation of the Agent against whom an action, which had been properly commenced, was pending, the action abated, except that, by virtue of the Act of February 8, 1899, the successor of such Agent could on proper motion within twelve months after such resignation but not later, be substituted for his predecessor and the action continued against such predecessor.

IV. The Act of March 3, 1923, recognizing the fact that it was necessary in order to avail of the consent of the government to be sued, to sue the incumbent, and not merely the office of Agent, and upon the resignation of an Agent, to substitute his successor within twelve months, is limited to actions which were "properly commenced."

V. The State Statutes relating to the substitution of parties on devolution of liability, have no application to an action against the Agent, and when construed to apply and to enlarge the right of a plaintiff beyond those accorded by the Transportation Act, 1920, and the act of March 3, 1923, are repugnant to the provisions of said Acts and are void.

ARGUMENT.

An action to recover damages for personal injuries caused by the negligent operation of a railroad during Federal control can be maintained only in strict conformity with the conditions imposed by Congress.

It is settled by the decisions of this court that an action arising out of the operation of the railroads during the period of Federal control is an action against the government of the United States.

Missouri Pacific R. R. Co. v. *Ault*, 256 U. S. 554;
Dahn v. *Davis*, 258 U. S. 421;
E. I. du Pont de Nemours & Co. v. *Davis*, 264 U. S. 456;
Davis, Agent v. *Donovan*, 265 U. S. 257;
Davis v. *Cohen Co.*, 268 U. S. 638;
United States ex rel. Rauch v. *Davis*, 8 Fed. (2d) 907, certiorari denied 270 U. S. 653;
Mellon v. *Weiss*, 270 U. S. 565.

It is equally well settled by the decisions of this court that the government of the United States can be sued only to the literal extent to which, by Act of Congress, it has waived its inherent immunity, and that any conditions which Congress imposes in permitting it to be sued must be strictly complied with.

Beers v. *Arkansas*, 20 How. 527;
Carr v. *United States*, 8 Otto 433;
Hans v. *State of Louisiana*, 134 U. S. 1;
Stanley v. *Schwalby*, 162 U. S. 255;
Price v. *United States and Osage Indians*, 174 U. S. 373;
Reid v. *United States*, 211 U. S. 529;

In *Price* v. *United States and Osage Indians, supra,* (174 U. S. 373, 375-376) this court said:

> "The Government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it. See among other cases, Schillinger *vs.* United States, 155 U. S. 163, 166, in which this Court said: 'The United States cannot be sued in their courts without their consent, and in granting such consent, Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the Courts for judicial determination. Beyond the letter of such consent the Courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the Government.'"

An action brought against "Walker D. Hines, as Agent designated by the President (Lehigh Valley Railroad)" after he had ceased to be the Agent designated by the President pursuant to Section 206 of the Transportation Act, 1920, does not comply with the provisions of that Act.

At the time the summons, naming as defendant "Walter D. Hines, as Agent designated by the President (Lehigh Valley Railroad)" was served on Guy E. Jackson on June 17, 1920, Federal control had terminated, and the effective statute which permitted actions arising out of the governmental operation of railroads to be brought and maintained was the Transportation Act, 1920 (41 U. S. Stat. 456, *et seq.*). Section 206(*a*) of that Act provides:

> "Actions at law, suits in equity, and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or systems of transportation of any carrier (under the provisions of the Federal Control Act, or of

> the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier."

At the time of the service of the summons, Walker D. Hines had resigned and was not the Director General of Railroads or the Agent under Section 206 of the Transportation Act, 1920. The agent at that time was John Barton Payne (Proclamation, May 14, 1920; 41 U. S. Stat. 1793-1794). The original complaint was ambiguous as to identity of the defendant intended to be sued (R. 4*b*-8), but both it and the amended complaint (R8-10) allege in effect that Walker D. Hines was at the time as of which the complaint speaks, namely at the time of the commencement of the action, the agent provided for in Section 206 of the Transportation Act, 1920 (R. 5, 9). The allegation, *verbatim*, is:

> "* * * and the President has, by proclamation, duly designated *the present* Director-General of Railroads, Walker D. Hines, or his successor in office, to be such agent." (Italics ours.)

This was the allegation of a fact, disprovable, it is true, by public acts and documents of which the courts take judicial notice. Otherwise, as an analysis of the first paragraph of the amended complaint will disclose, the facts alleged are substantially correct. The answer, therefore, was as follows (R. 11):

> "(1) Answering the allegations contained in the paragraph or subdivision of the complaint designated 'First', defendant denies upon information and belief that Walker D. Hines is the present Director-General of Railroads * * *."

thus admitting, by failure to deny, that

> "the President has, by proclamation, duly designated the * * * successor in office (of Walker D. Hines), to be such agent."

The answer was served on September 16, 1920 (R. 1), thus leaving nearly a year and a half within which proper steps could have been taken to subject the government to an action as prescribed by the Transportation Act, 1920. Yet no such steps were taken until August, 1923, or about a year and a half after the two year period limited by the Transportation Act, 1920, for bringing an action against the agent designated by the President had expired (R. 1, 12-14).

There can be no doubt that the agent who did in fact represent the government has duly resisted the belated effort to subject him to suit when such effort finally was made in August, 1923, if that be a material consideration.

Under these circumstances, the decisions of this Court in *Davis* v. *Cohen Co.*, 268 U. S. 638; *Mellon* v. *Weiss*, 270 U. S. 565; and *United States ex rel. Rauch* v. *Davis*, 8 F. (2d) 907, certiorari denied, 270 U. S. 653; are decisive in principle of the questions presented by this writ.

In *Davis* v. *Cohen Co.*, the defendant named when suit was commenced in January, 1920, that is, *during* Federal control, was New York, New Haven & Hartford Railroad Co., but it was described in the writ as a corporation "operated and controlled by the United States Railroad Administration" and service thereof "was made upon the clerk upon whom process against the Director General might have been served if the suit had been brought against him". The writ and declaration were amended, *ex parte*, in September, 1922, of which notice was served upon Davis, then Director General and Agent, who, appearing specially, moved that the service be set aside and the action against him dismissed. His motion having been denied, he was required to answer, which he did, preserving his objections to the court's jurisdiction at all stages. After the rendition

of a verdict against him, and entry of judgment deemed to be the final decision of the highest court of Massachusetts in which a decision could be had, he sued out a writ of error and petitioned for a writ of certiorari, and this Court, denying the petition, reversed the judgment on the writ of error, stating, pages 640-642:

> "Our conclusions may be briefly stated. The Railroad Company was not liable for the cause of action that had arisen during Federal Control; the sole liability being that of the Director General as the representative of the Government. *Missouri Pacific Railroad* v. *Ault*, 256 U. S. 554, 557. The original suit against the Railroad Company was not a suit against the Director General, and the service of the original writ upon the Railroad Company did not bring him before the court. While originally, after the passage of the Federal Control Act, it was sometimes thought that the Government might be held liable in a suit brought against the carrier, describing it as in the hands or possession of the Director General, all doubts as to how the suit should be brought was cleared away by the General Order of the Director General requiring that it should be brought against the Director General of Railroads, and not otherwise. *Ault Case, supra*, p. 561 (1921). And it is immaterial that, as admitted at bar, the service of the writ against the Railroad Company was made upon a clerk upon whom process against the Director General might have been served if the suit had been brought against him. 'The Federal agent was not bound to take cognizance of an action against the railroad corporation, even though the service was on the same local station agent, and even though the complaint stated a cause of action for personal injuries sustained during government control.' Davis *v.* Chrisp, 150 Ark. 335, 343.
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> "At the termination of Federal Control there was no suit pending against the Director General to enforce the liability of the Government. The amendment of the writ and declaration in the suit against the Railroad Company, in October, 1922, by substituting the designated Agent as the defendant, was, in effect, the commencement of a new and independent proceeding to

enforce this liability. Being commenced more than two years after the passage of the Transportation Act, it was repugnant to the provision of § 206 (*a*) requiring such an action to be instituted not later than two years after the passage of the Act. This was the only consent the Government had given to being sued in such an action after the termination of Federal Control. Nor was this amendment authorized under § 206 (*d*), which related solely to the substitution of the designated Agent as the defendant in a suit which had been previously brought against the Director General to enforce the liability of the Government, that is, merely authorized the substitution, in such a suit, of another Federal agent for the one already before the court.

If strict compliance with General Orders 50 and 50A is required, in order to subject the Government to suit, although the intention to enforce a liability arising out of Federal Control appeared on the face of the writ which was served within the permitted time on the very person on whom process against the Director General should have been served, and that at a time when the Director General was still operating the railroads, certainly no less effect will be given to the statute itself which takes the place of General Orders 50 and 50A as to regulating actions after the termination of Federal Control.

As we view the decision in the *Cohen* case, it amounts to reaffirmation of the principle that strict adherence to the literal requirements imposed by Congress as conditions to waiver of government immunity from suit, will be enforced. If so, it determines this controversy, because it cannot be claimed that any person, while occupying the office of Agent provided for in Section 206 of the Transportation Act, 1920, was ever a party to this action until the substitution of Davis on October 31, 1923, when the time to bring such action, as limited by the Transportation Act, 1920 (two years from the effective date of said act, February 28, 1920) and by the applicable state statute (three years from the date of accrual of the cause of action) had expired (C. P. A. § 49; Appendix, p. 41).

Such is the construction and interpretation of the *Cohen* decision by the District Court of Appeals of California, in *Natoli* v. *Davis, Agent*, 242 Pac. 895. That action was begun on November 1, 1921 (after the resignation of Payne) naming as defendants "Southern Pacific Company and John Barton Payne, as agent, under Section 206 of the Act of Congress of the United States known as the Transportation Act". In August, 1922, an amended complaint was filed naming as defendants Southern Pacific Company and James C. Davis, as agent under Section 206, and in October, 1922, a second amended complaint was filed naming as defendant only James C. Davis, as agent. The defendant, James C. Davis, appeared and demurred to the second amended complaint, upon the theory that the commencement of the action against Payne, as agent, after his resignation did not subject the government to suit. The court said:

> "Whatever confusion may have arisen by the decisions in the several cases which we have cited, the law is now definitely settled in the case of *Davis* v. *L. L. Cohen & Co.*, 45 Sup. Court Rep. 633, decided by the Supreme Court on June 8, 1925. This is the Massachusetts case to which we have heretofore referred, where the defendant Davis was permitted to be brought in by way of substitution after the two years specified in subdivision (*a*) of section 206 of the Transportation Act had expired. * * * The effect of this decision of the United States Supreme Court is to overrule all of the cases relied upon by the plaintiff and respondent in this action, and as it is one in which the United States is, in substance and effect, attempted to be made the responsible party, this court is bound by the decision of the Supreme Court of the United States in the Cohen case. It follows, that the demurrer of the defendant Davis, and his motion to quash, were both well taken."

The Supreme Court of Montana, in *Vassau* v. *Northern Pacific Ry. Co.*, 69 Mont. 350, 221 Pac. 1069, reached the same conclusion. That action was begun on September 12, 1921, that is, after Payne's resignation, against "Northern

Pacific Railway Company, a corporation, and John Barton Payne as Director General of Railroads and as Agent appointed by the President under the Transportation Act, 1920." The action related to a shipment made on November 1, 1919, and on February 4, 1922, on plaintiff's motion the title of the action was amended by inserting "James C. Davis as Agent under the Transportation Act of 1920" in lieu of the original designation of the defendants. Davis by answer set up the two years' limitation contained in the bill of lading, and the court held the defense good, on the theory that the action as far as the government was concerned must be deemed to have been begun on February 4, 1922. The court said:

> "The only means by which the responsible defendant—the United States—could be sued, was by making James C. Davis, present Agent, defendant, and this was not done until February 4, 1922. Plaintiffs sought to sue the wrong party and must abide the consequences of their error."

The Supreme Court of Oklahoma came to the same conclusion in *Davis* v. *Griffith*, 103 Okla. 137, 229, P. 499. In that case the action was commenced against Payne, as agent, on April 6, 1921; on motion of plaintiff, the summons was amended on July 15, 1921, by substituting Davis as agent, as defendant. On July 16, 1921, a default judgment was entered against the new defendant, no process having been served upon him. He then moved to vacate and set aside the judgment, and was successful on appeal after his motion had been overruled in the lower court. The Court said:

> "Subdivision (*d*) of section 206 of Transportation Act of 1920 provides that suits pending at the termination of federal control shall not abate, but may be prosecuted to final judgment by substituting the Agent designated by the President under subdivision (*a*). This shows clearly that Congress meant that the action must be maintained against the person who was named by the President as Agent and not against the office of Agent designated by

the President for such purpose. By Act of Congress approved March 3, 1923 (42 Stat. 1443), section 206 of Transportation Act of 1920 was amended by providing that actions of the character described in subdivisions (*a*), (*c*), or (*d*) of said section 206, when properly commenced and within the time prescribed and which were pending at the time said Act of March 3, 1923, became effective, shall not abate, by reason of the death, resignation, removal from office, or expiration of the term of office of the Agent designated by the President under section 206 of said Transportation Act, but may be prosecuted to final judgment by substituting the agent designated by the President then in office. If the action is to be maintained against the office of the 'Agent designated by the President for such purposes,' what need would there be for the substitution of parties defendant under the Act of March 3, 1923?

"It is clear, therefore, when the United States government, by Act of Congress, consented to be sued and directed that suits should be maintained against it by suing the 'Agent designated by the President for such purpose,' which means the same thing as the Agent who was 'named' by the President for such purpose, that a suit could not be brought against the government, except by bringing it against the 'person' who was named and was acting as the Agent under the Transportation Act of 1920. The government, the sovereign power, consented to be sued, and the manner in which it consented to be sued was a sovereign edict, and it must be complied with strictly, whether we feel that it is reasonable or unreasonable.

"The question involved here is very ably and fully discussed by the court in the case of *Vassau* v. *N. Pac. Ry. Co.* (Mont.), 221 Pac. 1069, and we fully concur in the views therein expressed. The cases cited by the plaintiffs, *Bailey* v. *Hines* (Va.), 109 S. E. 470, and *Arkansas Land & Lumber Co.* v. *Davis* (Ark.), 244 S. W. 730, sustaining their contention, are based upon and largely influenced by the local statutes of said states, and we do not think they are controlling because the question here is determined solely by the construction to be given the language used in section 206 of the Transportation Act of 1920.

> "We conclude that the United States could be sued, only, by making the Agent, named by the President under Transportation Act of 1920 for such purpose, party defendant, who in this instance was James C. Davis; and that the trial court acquired no jurisdiction by the attempted substitution of Davis for Payne, since such jurisdiction could be had, only, by service of process."

The same conclusion was reached by the Court of Civil Appeals of Texas in *Davis* v. *Crossman*, 249 S. W. 540, where the action was commenced against Hines, as agent, in November, 1921. He answered denying that he was at that time the agent. In May, 1922, a new action was brought against Davis, as agent, who set up as a defense the two year limitation prescribed in the Transportation Act, 1920. The two actions were consolidated, and judgment was entered against Davis. He appealed, and the judgment was reversed, the Court holding that no action was pending against the authorized agent until after the time limitation contained in the Transportation Act had run.

The same view was taken by the Circuit Court of Appeals, Eighth Circuit, in *Davidson* v. *Payne*, 289 Fed. 69. The action was commenced in the State Court on April 21, 1921 against John Barton Payne, Agent, etc. and was removed to the Federal Court, where a demurrer was interposed, and sustained by the District Court (281 Fed. 544). The Circuit Court of Appeals, ignoring the grounds on which the District Court had sustained the demurrer, and likewise brushing aside the defendant's motion to dismiss the appeal on the ground that twelve months had elapsed since his resignation and there had been no substitution of his successor in accordance with the Act of Congress entitled "An Act to prevent the abatement of certain actions" of February 8, 1899 (30 Stat. 822) affirmed the judgment, stating, page 72:

> "Since his resignation on March 28, 1921, John Barton Payne has had no authority to represent the President of the United States in any litigation arising out of the operation of railroads during the World War.

> Appellant brought suit against the wrong party, and must abide the consequences of his mistake. * * *
>
> The suit cannot be maintained against John Barton Payne, and the court below did not err in sustaining his demurrer to the complaint."

In *United States ex rel. Rauch* v. *Davis,* 8 F. (2d) 907, this Court denied, 270 U. S. 653, a petition for a writ of certiorari to review a judgment dismissing a petition for a writ of mandamus to compel the payment of a judgment entered in the New York Supreme Court in New York County in an action in which the summons was served on the proper person the day following the resignation of Hines as Director General of Railroads and Agent. The summons named as defendant "Walker D. Hines, Director General of Railroads, Hudson & Manhattan Railway Company." An answer, taking issue with allegations of the complaint, was filed in the name of the defendant; the action was regularly noticed for trial and a trial was had, the defendant not appearing, resulting in the judgment payment of which was sought. Subsequently, after the passage of the Winslow Bill (42 Stat. 1443) on motion of the plaintiff an order was made amending the name of the defendant to read "James C. Davis, Director General of Railroads (Hudson & Manhattan Railway Co.) and Agent of the President". The Court of Appeals of the District of Columbia said (pp. 908-909):

> "We are of the opinion that the judgment entered on October 5, 1922, in the Supreme Court of New York County, against 'Walker D. Hines, Director General, Hudson & Manhattan Railway Co.,' was void, since he was sued only as Director General, and not as Agent designated by the President, these being distinct and separate offices, and since in fact he did not hold either office when the summons was served, nor at any time during the pendency of the action. It is true that service of the summons was attempted to be made by copy left with a person who at the time was entitled to accept service for John Barton Payne, the successor of Mr. Hines, had he been named as defendant; but that fact is immaterial, since Mr. Payne was not named as de-

fendant, nor was any judgment sought or entered against him.

"It is suggested that the manifest purpose of the action was to procure a judgment which should be enforceable against the funds of the Railroad Administration, that the individual name of the Agent to be sued was of no real consequence, and that the aforesaid misnomer should be disregarded. This suggestion is answered by the fact that the act provides that after the termination of federal control actions of this character may be brought only against the Agent designated by the President for that purpose. The act also provides that a case properly commenced against the Director General, and pending against him at the termination of federal control, shall not abate by reason of such termination, but may be prosecuted to final judgment, after the substitution of the Agent designated by the President under the act. In each instance the Agent, not his official title alone, must be named as defendant. *Tutsch* v. *Director General of Railroads*, 52 Cal. App. 650, 199 P. 861; *Davis, Director General of Railroads* v. *Griffith*, 103 Okl. 137, 229 P. 499; *Vassus* v. *Northern Pacific Railway Co.*, 69 Mont. 305, 221 P. 1069, 1072, 1073.

"It follows also that the order of February 1, 1924, amending and changing the judgment already entered against 'Walker D. Hines, Director General, Hudson & Manhattan Railway Co.,' so that it would run against 'James C. Davis, Director General of Railroads (Hudson & Manhattan Railway Co.) and Agent of the President,' was void, since otherwise the so-called amendment would have the effect of giving validity to the judgment at a time more than two years subsequent to the enactment of the Transportation Act, whereas Congress had refused consent to the bringing of such actions after that period. Transportation Act 1920, § 206 (*a*), being Comp. St. Ann. Supp., 1923, § 10071 ¼ cc; *Davis* v. *Chrisp*, 159 Ark. 335, 252 S. W. 606, certiorari denied 263 U. S. 710, 44 S. Ct. 36, 68 L. Ed. 518. Nor was the order authorized by the Act of March 3, 1923 (Comp. St. Supp. 1925, § 10071 ¼ cc), amending section 206 of the Transportation Act, since that enactment relates only to 'actions * * * properly commenced within the period of limitation prescribed, and pending at the time this subdivision takes effect.' The action now in question was

not properly commenced, nor was it pending at the time when the subdivision took effect.

"It is settled beyond dispute that actions at law which may be brought against the Agent designated by the President under the Tranportation Act are in legal effect actions against the United States. *Dupont de Nemours & Co.* v. *Davis, Director General,* 264 U. S. 456, 462, 44 S. Ct. 364, 68 L. Ed. 788. It is also true that, since the United States can be sued only with the consent of Congress, the conditions imposed by Congress in respect to such actions must be strictly followed. *McElrath* v. *U. S.,* 102 U. S. 426, 440, 26 L. Ed. 189; *Schillinger* v. *U. S.,* 155 U. S. 163, 166, 15 S. Ct. 85, 39 L. Ed. 108; *Price* v. *U. S.,* 174 U. S. 373, 375, 19 S. Ct. 765, 43 L. Ed. 1011; *Davis, Agent,* v. *Donovan,* 265 U. S. 257, 263, 44 S. Ct. 513, 68 L. Ed. 1008. And, where the the congressional consent specifies the time within which such actions may be brought, the provision operates as a condition of liability, not merely as a period of limitation. *Finn* v. *U. S.,* 123 U. S. 227, 233, 8 S. Ct. 82, 31 L. Ed. 126; *James C. Davis, Agent,* v. *L. L. Cohen & Co.,* 268 U. S. 638, 45 S. Ct. 633, 69 L. Ed. 1129.

"It follows that the Supreme Court of the County of New York was without jurisdiction to enter the judgment relied upon by the present appellant, and since that fact is apparent upon the face of the record the appellee was entitled to treat it as a nullity. *Old Wayne Mutual Ins. Association* v. *McDonough,* 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345; *Vallely, Trustee,* v. *Northern Insurance Co.,* 254 U. S. 348, 353, 41 S. Ct. 116, 65 L. Ed. 297."

This Court has recently (October 11, 1926) granted a petition for a writ of certiorari to the Supreme Court of Arkansas in the case of *Mellon* v. *Arkansas Land & Lumber Co.,* 155 Ark. 541, 170 Ark. 552 (47 S. C. 94; Adv. Op. Nov. 15, 1926 p. 118), one of the few decisions contrary to the contentions of the plaintiff-in-error.

The Act of March 3, 1923 (42 Stat. 1443), does not authorize the reinstatement of the cause of action or the substitution of the proper defendant, since this action was not properly commenced.

After the decisions of this Court in *LeCrone* v. *McAdoo*, 253 U. S. 217; *Payne* v. *Industrial Board of Illinois*, 258 U. S. 613; and *Payne* v. *Stevens*, 260 U. S. 705, Congress passed "an Act to amend Section 206 of the Transportation Act, 1920" (42 Stat. 1443) approved March 3, 1923. See Appendix (p. 36). By the added subdivision (*b*) it was provided that actions described in subdivision (*a*)

> "properly commenced within the period of limitation prescribed"

shall not abate by reason of the resignation of the agent, despite the provisions of the Act of February 8, 1899, but may be prosecuted to final judgment, etc.,

> "substituting at any time before satisfaction of such final judgment, decree or award, the agent then in office."

By subdivision (*i*) it was provided that actions, etc.,

> "of the character described in subdivision (*h*) which have been abated or dismissed solely because of the provisions of such Act of February 8, 1899, shall be reinstated upon reasonable notice to the adverse party, and upon proper motion therefor filed within one year from the time this subdivision takes effect."

There can be no room for argument as to the proposition that an action, even though properly commenced, in which no substitution was had within twelve months after the resignation of the official, whether Director General or Agent, abated. The decisions in the *LeCrone* and other cases above referred to make it clear that this Court regards such an

action as one "against the head of any department or business * * * of the United States in his official capacity" within the meaning of the Act of February 8, 1899. There can be no possible grounds for these decisions except that it was necessary that the incumbent of the office, and not merely a description of the official, should be a party to the action. The Winslow Bill was passed to relieve plaintiffs, who had properly commenced an action and had failed to effect a substitution of the various Directors General or Agents by name, of the effect of those decisions, but the act is limited to actions "properly commenced within the period of limitation prescribed". It thus recognizes that the person, rather than the office, must be named, and it is well settled that

> "if it can be gathered from a subsequent statute *in pari materia*, what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning and will govern the construction of the first statute." *United States* v. *Freeman*, 3 How. 556, 565.

See also:

Cope v. *Cope*, 137 U. S. 682, 688.

Bowling v. *United States*, 233 U. S. 528, 535-536.

N. Y. Phila. & Norfolk R. R. Co. v. *Peninsular Produce Exchange*, 240 U. S. 34, 39-40.

Referring to the Act of March 3, 1923, the Supreme Court of Montana in *Vassau* v. *Northern Pacific Ry. Co.*, 221 Pac. 1069, 69 Mont. 305, said:

> "The very fact that the Act provides for the substitution of one Presidential Agent for another demonstrates that it was the intention of Congress that under the Transportation Act of 1920 the government consented to be sued only in the name of the Presidential Agent in office at the time the action was commenced * * *
>
> "Plaintiffs cannot avail themselves of the provisions of the Act of March 3, 1923, for the reason that the action

was not properly commenced in the first instance. *Roseland* v. *Minneapolis & St. Louis Ry. Co. et al.*, U. S. District Court, District of Minnesota; no opinion."

See also:

Davis v. *Griffith*, 229 Pac. 499, 103 Okla. 137.
Davidson v. *Payne*, 289 Fed. 69.
Natoli v. *Davis, Agent*, 242 Pac. 895.
Davis v. *Crossman*, 249 S. W. 540.
United States ex rel. Rauch v. *Davis*, 8 F. (2d) 907.

If our major premise, namely, that the government was not a party to the action, until the substitution of Davis, is sound, it follows that the action is not one to which the Act of March 3, 1923, applies, because it was not "properly commenced".

The Statutes of the State of New York, as necessarily construed and as applied in this action, are invalid and are repugnant to the laws of the United States.

No opinion has been written in this action, or in any other analogous situation by the Courts of the State of New York, except as we shall point out, and it is therefore uncertain what authority for the rulings complained of were deemed by the New York Courts to exist which warranted the rulings. It is, however, apparent from the form of the order (R. 14-15) that the plaintiff deemed himself entitled to a reinstatement of the cause of action and the substitution of Davis, as Agent, under the provisions of the Act of March 3, 1923. As we have shown, that act does not apply to this case, if, as we contend, the plaintiff was required by the Transportation Act, 1920, to sue the designated agent in office not later than two years after the passage of the Transportation Act, 1920, and not later than the time allowed by the State statute of limitations, in this case three years.

It is nevertheless apparent, from the decisions before referred to, and particularly from the provisions of the Act of February 8, 1899, and the Act of March 3, 1923, that in an action arising out of the government operation of railroads pending at the time of the resignation of one Agent and the appointment of a successor, a substitution of the successor as a party to the action is a prerequisite to its continued prosecution.

It is true that in *U. T. Hungerford Brass & Copper Company* v. *Hines*, 236 N. Y. 528, and *Lawrey* v. *Hines*, 237 N. Y. 174, the substitution is treated as an "amendment" although in the *Lawrey* case, p. 177, it is said that the orders appealed from should be reversed and

> "the motion for judgment dismissing the complaint with costs granted, unless within thirty days and on payment of said costs the Special Term permits *an amendment of the summons by substituting the name of the proper defendant.*" (Italics ours.)

These cases must in any event be deemed to have been disapproved by this Court by its denial of certiorari in *United States ex rel. Rauch* v. *Hines*, 8 F. (2d) 907, 270 U. S. 653.

If, then, a substitution is necessary, the sections of the New York Civil Practice Act relating to the substitution of parties on devolution of liability must be deemed to constitute the authority for the rulings of the court in this action.

Section 83 of said Act (Laws of New York, 1920, ch. 925) provides:

> "*Proceedings upon transfer of interest, or devolution of liability.* In case of a transfer of interest or devolution of liability, the action may be continued by or against the original party, unless the court directs the person to whom the interest is transferred or upon whom the liability is devolved to be substituted in the action or joined with the original party as the case requires."

Section 192 of said Act provides:

> "No action or special proceeding shall be defeated by the nonjoinder or misjoinder of parties. New parties

may be added or substituted and parties misjoined may be dropped by order of the court at any stage of the cause as the ends of justice may require."

In this view, the question is similar to that in *Davis* v. *Cohen Co.*, 268 U. S. 638, where this court said:

> "The sole question here presented is whether the provisions of the Massachusetts General Laws, c. 231, §§ 51, 138, authorizing amendments in any process, pleading or proceeding at any time before final judgment, as construed and applied in this case, are invalid because of repugnance to § 206 of the Transportation Act. * * *
>
> "It results that the provisions of the Massachusetts General Laws under which the plaintiff was allowed to amend the writ and declaration so as to substitute the designated Agent as the defendant instead of the Railroad Company, as construed and applied in the present case, are void because of repugnancy to § 206 of the Transportation Act."

That questions of the character here presented are governed by the laws of the United States, and that the rights of litigants cannot be enlarged or diminished by any State law, statutory or otherwise, appears to be settled by the decisions of this Court.

Davis v. *Wechsler*, 263 U. S. 22;
Davis v. *O'Hara*, 266 U. S. 314.

We conclude, therefore, that since there is no federal statute which authorizes the rulings of the state courts in substituting Davis, as Agent, in this action, which was not "properly commenced," after the several periods of limitation had expired, it must be deemed, although no opinion has been handed down, that they construed the state statutes relating to substitution of parties as authorizing the substitution in this case. As so construed and applied, it is apparent that the period within which the government has been subjected to suit has been extended beyond the two year period specified in the Transportation Act, 1920, and beyond

the period fixed by the state statute of limitations to commence an action for personal injuries resulting from negligence, and that such a construction and application of these state statutes are repugnant to the provisions of the Transportation Act, 1920, permitting the maintenance of such an action in the manner and within the time specified therein.

Such a construction and application are repugnant, furthermore, to the provisions of the Act of March 3, 1923, in that that act limits the power of substituting the proper defendant for the one named in the action, to actions which were "properly commenced."

In the event, however, this Court takes the view that because state courts have rendered no opinion and have therefore not expressly passed upon the validity or application of the State statutes in question, the proper method of review in this court is by certiorari, we respectfully submit that, in accordance with subdivision (*c*) of Section 237 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, chap. 229) the papers whereon this writ of error was allowed should be regarded and acted on as a petition for certiorari.

Respectfully submitted,

CLIFTON P. WILLIAMSON,
HERBERT S. OGDEN,
Counsel for Plaintiff-in-Error.

APPENDIX.

Chap 233.—An Act To Amend Section 206 of the Transportation Act, 1920.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 206 of the Transportation Act, 1920, is amended by adding at the end thereof two new subdivisions to read as follows:

"(*h*) Actions, suits, proceedings, and reparation claims, of the character described in subdivision (*a*), (*c*), or (*d*), properly commenced within the period of limitation prescribed, and pending at the time this subdivision takes effect, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under subdivision (*a*), but may (despite the provisions of the Act entitled 'An Act to prevent the abatement of certain actions,' approved February 8, 1899), be prosecuted to final judgment, decree or award, substituting at any time before satisfaction of such final judgment, decree or award the agent designated by the President then in office. Nor shall any action, suit, or other proceeding heretofore or hereafter brought by any public officer or official, in his official capacity, to enforce or compel the performance of an obligation due or accruing to the United States arising out of Federal control, abate by reason of the death, resignation, retirement, or removal from office of such officer or official, but such action, suit or other proceeding may (despite the provisions of such Act of February 8, 1899), be prosecuted to final judgment, decree or award, substituting at any time before satisfaction of any such final judgment, decree, or award the successor in office.

"(*i*) Orders providing for a substitution in such cases made before this subdivision takes effect by courts having jurisdiction of the parties and subject matter are hereby validated, anything in such Act of February 8, 1899, to the contrary notwithstanding. Actions, suits, reparation claims, or other proceedings of the character described in subdivision (*h*) which have been abated or dismissed solely because of the provisions of such Act of February 8, 1899, shall be reinstated upon reasonable notice to the adverse party, and upon proper motion therefor filed within one year from the time this subdivision takes effect."

Approved, March 3, 1923.

By the President of the United States of America.

A Proclamation.

WHEREAS by Proclamation dated March 11th, 1920, Walker D. Hines, Director General of Railroads, was designated as the Agent provided for in Section 206 of the Transportation Act, 1920; and

WHEREAS the said Walker D. Hines, Director General of Railroads, as aforesaid has tendered his resignation as said Agent, which has been duly accepted, effective as of 18 May, 1920:

NOW, THEREFORE I, Woodrow Wilson, President of the United States, under and by virtue of the power and authority vested in me by said Act, and of all other powers me hereto enabling, do hereby designate and appoint, effective the 18th day of May, 1920, John Barton Payne, Director General of Railroads, and his successor in office, as the Agent provided for in Section 206 of said Act, approved February 28, 1920.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE by the President in the District of Columbia this 14th day of May, in the year of our Lord, Nineteen Hundred and Twenty, and of the Independence of the United States the One Hundred and Forty-fourth.

[SEAL.] WOODROW WILSON

By the President:

BAINBRIDGE COLBY

Secretary of State.

By the President of the United States of America.

A Proclamation.

WHEREAS by Proclamation dated May 14, 1920, John Barton Payne, Director General of Railroads, was designated as the Agent provided for in Section 206 of the Transportation Act, 1920; and

WHEREAS the said John Barton Payne, Director General of Railroads, as aforesaid has tendered his resignation as said Agent, which has been duly accepted, effective upon the qualification of his successor:

NOW, THEREFORE, I, WARREN G. HARDING, President of the United States, under and by virtue of the power and authority vested in me by said Act, and of all other powers me hereto enabling, do hereby designate and appoint, effective at noon on the 28th day of March, 1921, James C. Davis, Director General of Railroads, and his successor in office, as the Agent provided for in Section 206 of said Act, approved February 28, 1920.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE by the President in the District of Columbia this 26th day of March, in the year of our Lord Nineteen Hundred and Twenty-one, and of the Independence of the United States the One Hundred and Forty-fifth.

[SEAL.] WARREN G. HARDING

By the President:
CHARLES E. HUGHES
Secretary of State.

By the President of the United States of America.

A Proclamation.

WHEREAS by Proclamation dated August 13, 1923, James C. Davis, Director General of Railroads, was designated as the Agent provided for in Section 206 of the Transportation Act, 1920; and

WHEREAS, the said James C. Davis, Director General of Railroads, as aforesaid has tendered his resignation as said Agent, which has been duly accepted, effective upon the qualification of his successor:

NOW, THEREFORE, I, CALVIN COOLIDGE, President of the United States, under and by virtue of the power and authority vested in me by said Act, and of all other powers me hereto enabling, do hereby designate and appoint, effective at midnight on the 31st day of December, 1925, Andrew W. Mellon, Director General of Railroads, and his successor in office, as the Agent provided for in Section 206 of said Act, approved February 28, 1920.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE by the President at the City of Washington this 14th day of December, in the year of our Lord Nineteen Hundred and Twenty-five, and of the Independence of the United States the One Hundred and Fiftieth.

[SEAL] CALVIN COOLIDGE

By the President:

FRANK B. KELLOGG

Secretary of State.

New York Civil Practice Act.

(Laws 1920, Ch. 925.)

§ 49. *Actions to be commenced within three years.* The following actions must be commenced within three years after the cause of action has accrued:

* * * * * *

6. An action to recover damages for personal injuries resulting from negligence.

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CHARLES ELMORE CROPLE
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. [redacted] 74

ANDREW W. MELLON, Director General of Railroads, as Agent Designated by the President Pursuant to Section 206 of the Transportation Act, 1920,

Plaintiff-in-Error,

against

THOMAS O'NEILL,

Defendant-in-Error.

BRIEF OF DEFENDANT-IN-ERROR ON WRIT OF ERROR TO THE JUDGES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST JUDICIAL DEPARTMENT AND THE JUDGES OF THE SUPREME COURT OF THE STATE OF NEW YORK.

OLCOTT, OLCOTT & GLASS,
Attorneys for Defendant-in-Error.

NATHAN BALLIN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

ANDREW W. MELLON, Director General of Railroads, as Agent designated by the President pursuant to Section 206 of the Transportation Act, 1920,
Plaintiff-in-Error,

against

THOMAS E. O'NEILL,
Defendant-in-Error.

No. 418.

BRIEF OF DEFENDANT-IN-ERROR ON WRIT OF ERROR TO THE JUDGES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST JUDICIAL DEPARTMENT AND THE JUDGES OF THE SUPREME COURT OF THE STATE OF NEW YORK.

Official Report of Opinions Below.

No opinion was rendered below, but the decision of the Appellate Division of the Supreme Court for the First Judicial Department affirming the order reinstating the cause of action and substituting James C. Davis, the Director-General of Railroads, as agent designated by the President in place and stead of Walker D. Hines as party defendant is reported in 208 New York Appellate Division Reports 721; the decision in the said Appellate Division affirming the judgment is reported in 215 New York Appellate Divi-

sion Reports 766; the decision of the said Appellate Division denying the motion for leave to appeal to the Court of Appeals is reported in 215 New York Appellate Division Reports 813; and the decision of the Court of Appeals denying the motion for leave to appeal is not reported.

Supplemental Statement of the Case.

The action is one to recover damages for personal injuries sustained by the defendant-in-error on February 22, 1920, while a passenger upon a train of the Lehigh Valley Railroad which was then under the management and control of the United States Government through its railroad administration (R., 4b-6).

The trial of the action resulted in a judgment for the defendant-in-error and against "James C. Davis, as agent designated by the President," in the sum of $1122.34 (R., 22).

The plaintiff-in-error does not question the merits of the controversy but seeks a reversal upon the theory that a recovery against "James C. Davis, Director General of the Railroads, as Agent designated by the President," cannot be sustained, and consequently such judgment is ineffective as against the present plaintiff-in-error, who is the successor in office of the aforesaid James C. Davis.

At the time of the accident in February, 1920, the Lehigh Valley Railroad was under Federal control and Walker D. Hines was the Director General of Railroads and was appointed Agent under Section 206 of the Transportation Act on March 11, 1920 (Proclamation March 11, 1920; 41 U. S. Stat., Part II, p. 1789).

Mr. Hines resigned as Director General and Agent on May 18, 1920, being succeeded in office by John Barton Payne (Proclamation May 14, 1920; 41 U. S. Stat. 1794).

The action was commenced on the 17th day of June, 1920, by the service of a summons upon Guy E. Jackson, the des-

ignated agent of the then defendant, Walker D. Hines, for the acceptance of legal process in this district (R., 5). *No objection has ever been made, at this time or at any other time to the validity and propriety of such service.*

In fact, thereafter, on July 6, 1920, almost two months after his resignation, Walker D. Hines as Agent designated by the President, submitted himself to the jurisdiction of the Court **by duly appearing generally in the action** by the same attorneys who are now appearing and we conducted the trial for the subsequently substituted defendant James C. Davis (R., 4b). No question of misnomer was raised at that time by the then defendant's attorneys, and in fact, issue was duly joined on the merits by the service of an answer of the then defendant Hines to the amended complaint of the plaintiff (R., 11). Further confirming the submission of the then defendant to the jurisdiction of the Court, these same attorneys, prior to the serving of their answer for the then defendant, Hines, moved on the 20th day of August, 1920, upon certain papers, "and the defendant's notice of appearance herein filed in the office of the Clerk of said County on or about the 7th day of July 1920", to strike out certain allegations in the original complaint and to make it more definite and certain (R., 7-8). The affidavit accompanying the notice of motion made by a member of the same firm of attorneys now appearing for the plaintiff-in-error herein, contains at page 8 of the Record, an affidavit of merits on behalf of the then defendant Walker D. Hines, wherein the attorney swears, "that from a statement of the case made to deponent by the defendant, his employees, agents and servants, deponent verily believes that the defendant has a good and substantial defense *upon the merits* to the alleged cause of action set forth in the complaint or to some part thereof." This affidavit was made on August 20, 1920, three months after the resignation of Mr. Hines (R., 8).

The "Statement of the Case" in plaintiff-in-error's brief contains no mention of this very important affidavit of Au-

gust 20, 1920, bearing directly upon the vital question of the court's jurisdiction over the person of the then defendant, Hines.

The answer of the then defendant Hines (R., 11) verified the 16th day of September, 1920, four months after his resignation, contains the first suggestion by his attorneys that Mr. Hines was not "the present Director General of Railroads," but in spite of this, it is admitted expressly that "the railroad properties, material and equipment, belonging to the Lehigh Valley Railroad were at said times under Federal control and maintained through the agency of Walker D. Hines as Director General of Railroads and his predecessor in office," and admitted further by failure to deny that "by General Order No. 50 duly made and issued pursuant to law by the said Director General, it was ordered and directed in substance that suits and litigations growing out of matters arising out of or during Federal control of the said railroad should be brought against the said Director-General of Railroads, or his successor in office, and by the Federal Transportation Act of 1920 it was provided that suits and litigations growing out of said Federal control be brought against the agent designated by the President of the United States of America, *and the President has, by proclamation, duly designated the present Director-General of Railroads, Walker D. Hines, or his successor in office to be such agent*" (R., 8-9).

Still further acting for the then defendant, Walker D. Hines, as Agent designated by the President, who had resigned many months before, these same attorneys duly noticed the case for trial and it appeared on the calendar of the Court for January 10, 1923 (R., 13). Thereupon the case was adjourned to the February call of the calendar, but, through error, appeared on the day calendar of the court for February 3, 1923, unknown to the defendant-in-error or his attorneys, so that in the absence of plaintiff's attorneys, it was marked "abated" by the attorney for the then defendant Hines (R., 13). Meanwhile the succeeding Director-General

and Agent, John Barton Payne, had also resigned, and he in turn was succeeded on March 28, 1921, by James C. Davis. The then plaintiff, now defendant-in-error, then moved to reinstate the cause of action and to substitute James C. Davis as the defendant, which motion was granted under authority of amendment to §206 of the Transportation Act of 1920, which went into effect March 3, 1923 (R., 12-14). (See Appendix, p. 30 of this brief.) The substituted defendant, James C. Davis, Director-General of Railroads as Agent designated by the President, appeared specially on appeal to the Appellate Division of New York Supreme Court, First Department, from the granting of the said order (R., 14-15). The Appellate Division affirmed the order (R., 16), rendering no opinion (208 App. Div. 721).

Thereafter the substituted defendant Davis moved for leave to file a supplemental answer wherein the defendant proposed to adopt "the answer of the former defendant Walker D. Hines" and to add certain supplemental matter thereto (R., 17-21), and that motion was denied on the 23rd day of February, 1924 (R., 21). Two days later the case was tried before the Court and a jury, the same attorneys acting for the defendant James C. Davis as Agent designated by the President as had theretofore acted for Walker D. Hines, as Agent designated by the President. Judgment was rendered in favor of plaintiff in the sum of $1,122.34 (R., 22), and the defendant appealed to the Appellate Division, First Department, again being represented in the appeal by the same attorneys, bringing up for review, among others, the order substituting James C. Davis, Director General of Railroads as Agent designated by the President as defendant, and the order of affirmation thereof and the order denying the defendant's motion for leave to serve and file the supplemental answer (R., 2-3). The Appellate Division affirmed the judgment and orders except as to the order relating to substitution of the defendant, as to which the appeal was dismissed (R., 28-29). James C. Davis resigned as Di-

rector-General of Railroads and as Agent and was duly succeeded by Andrew W. Mellon. Subsequently said Andrew W. Mellon was duly substituted as defendant in place and stead of James C. Davis. (See p. 9 of brief for plaintiff-in-error.)

This writ of error was sued out on May 1, 1926 (R., 40-41), after Appellate Division and the Court of Appeals denied the motion of plaintiff-in-error to appeal (p. 9 of brief of plaintiff-in-error).

ARGUMENT.

I.

The Action Was Properly Commenced.

The plaintiff-in-error in his Specification of Assigned Errors urges as one of such errors that the courts of New York erred in ruling that the action was properly commenced. (See Specification of Assigned Errors Nos. 6 and 8, pp. 11 and 12 of plaintiff-in-error's brief.) Subsequent points of the plaintiff-in-error's brief are dependent on this argument. (See p. 30 of plaintiff-in-error's brief.)

In view of this we will endeavor to show that the action was in fact properly commenced.

We do not question that an action to recover damages for personal injuries caused by the negligent operation of the Railroad during Federal control can be maintained only in strict conformity with the conditions imposed by courts. In other words, we do not question that ordinarily the United States cannot be sued for its tort, and that the only way such a suit can be maintained, is if permission or leave to sue has been granted by the United States.

We do contend, however, that where once such an enabling statute has been passed, if there is any ambiguity as to the application of such a statute, the injured party is entitled to

the full protection of such ambiguity, and is further entitled to all privileges which said suit was intended to cover. This, of course, does not mean that the conditions or requirements for the maintenance of the suit may be disregarded where such conditions and requirements are plainly stated, but where there is a case of doubtful interpretation, the injured party is entitled to the benefit of each and every doubt.

The Transportation Act of 1920 provides that such an action must be brought "against an Agent designated by the President for such purpose" within the period of limitation prescribed by state or federal statute, not, however, exceeding two years from the date of the passage of said Act. If this language is followed literally, it can only mean that the action must be brought against the Agent that was designated by the President pursuant to said Act, and the only Agent designated by the President, pursuant to this Act (President's Proclamation appointing Walker D. Hines as Agent, Proclamation March 11, 1920, 41 U. S. Stat., 1794) was Walker D. Hines. It is true that later proclamations appointed various successors to Walker D. Hines as Agent, but according to the strict language of the Act, only the First Agent is referred to, and the first agent was Walker D. Hines. Furthermore, the language of the Act can possibly be construed as meaning that the action should be brought against the Agent who was in office at the time of the accident in question, and if this test is applied, then the only Agent who was in office on the date of the accident in question, namely, February 22, 1920, was Walker D. Hines. In view of the ambiguity which the Transportation Act of 1920 presents, was it not more just and fair to presume that such ambiguity is to be resolved in favor of an injured party? With this in mind, let us see if the action was properly commenced.

Aside from the methods of commencing an action involving provisional remedies, such as attachments or arrests, with which we are not at the present time concerned, Section

218 of the Civil Practice Act indicates the correct and usual method as follows:

> "A Civil action is commenced by the service of a summons which is a mandate of the court."

Section 237 of the Civil Practice Act further provides:

> "A voluntary general appearance of the defendant is equivalent to personal service of the summons upon him."

As a matter of fact, the summons herein was served, as disclosed in the affidavit of service (R., 4a) upon Guy E. Jackson, designated Agent for the defendant in this action, and at no time, not even in the present appeal, is there any question raised as to that method of serving the summons herein on the defendant Hines.

In fact the opening words of *Lawrey* vs. *Hines*, 237 N. Y. 174, are well applicable to the present case. There the Court said:

> "I think it is fairly to be inferred, both from what the defendant says, *and from what he omits to say*, that the officer of the corporation to whom the summons was delivered was the duly authorized representative of the federal agent, empowered to accept delivery of the summons in the latter's behalf. *No point is urged to the contrary.* The failure to make the objection is persuasive that the facts do not justify the making."

However, even were the method of service herein defective, nevertheless, under Section 237 of the Civil Practice Act above quoted, **the subsequent voluntary general appearance of the defendant Hines was equivalent to personal service of the summons upon him.**

That appearance will be found at page 4b of Record, where the attorneys for plaintiff-in-error describing themselves as attorneys for the then defendant Walker D. Hines, entered a notice of appearance voluntarily and generally. This act on

the part of the appellant's attorney two months after the defendant Hines' resignation can be reasonably explained only on the theory that the real defendant in these kinds of actions is at all times the United States and not the individual holding the office of agent at any given time. This position it seems is in complete accord with the contention of the plaintiff-in-error, urged in the very first sentence of its first argument that "it is settled by decisions of this court that an action arising out of the operation of the railroads during the period of Federal control *is an action against the Government of the United States.*" (See p. 17 of plaintiff-in-error's brief, and numerous cases there cited.)

At any rate, their notice of appearance, under Section 237 of the Civil Practice Act, cured any defect of service in the summons and conferred jurisdiction upon the court over the person named as defendant therein.

A great many state court decisions to the effect that a voluntary general appearance is equivalent to conferring jurisdiction of the person might be mentioned. A few will suffice, such as

> *James* v. *Second Russian Insurance Co.*, 208 A. D. 141,

where it is said at page 143:

> "Furthermore there was an appearance generally in the action, and this would be a complete answer to the claim of the defendant that the court had not jurisdiction of the person of the defendant."

See, also,

> *Meyers* v. *American Locomotive Co.*, 201 N. Y. 163;
> *Catlin* v. *Rick*, 91 N. Y. 668.

And the Federal Courts too have recognized a notice of appearance as conferring such jurisdiction.

> *Williston* vs. *Raymond*, 213 Fed. 527.

In fact, the principle was applied by the Federal Court in a recent case involving the construction of the same Transportation Act now before this Court.

In

Rosenzweig v. *Hines*, 285 Fed. 622,

it was said:

> "In the present case the liability accrued during the period of governmental control. The process, however, was not served until about six months after the return of the railroad in question to its owner, and it appears that *the action was irregularly brought against the director general who was not then acting in that capacity or in the capacity of agent against whom the action might properly be brought.* Hence the contention is that this court did not obtain jurisdiction of the person of the defendant. But I am of a contrary opinion. Jurisdiction of the subject-matter involved herein and the right to entertain the suit as heretofore shown was specifically derived from the provision relating to Federal Control, and in my opinion plaintiffs' right of action and the remedy were not abated. Although the Director General was irregularly served with the summons and complaint, *I think the designated agent had the right afterwards to waive any irregularity of that nature, and submit himself to the jurisdiction of the court by his general appearance,* and answer to the merits or by his consent to be substituted in the place of the director-general. Having done so by his attorney, he could not in fairness at the trial take the position that he had not been properly served with process in his representative capacity, and thus oust the plaintiff."

The decision of this case was affirmed by Circuit Court of Appeals in 285 Fed. 1021.

It will be noted that the above case presents precisely the point here argued, except that the plaintiff there aggravated the misnomer of the Agent, by failing to designate him as "agent" and entitling him "Director General of Railroads and the New York Central Railroad."

After such a general and voluntary appearance, it appears to us futile on part of plaintiff-in-error to insist that the action was not properly commenced, with respect to jurisdiction over the defendant's person, and this is particularly true in view of the further acts of the defendant Hines through the plaintiff-in-error's attorneys following his notice of appearance. Thus, not only did the defendant Hines, as Agent of the President, submit himself to the jurisdiction of the Court by such an appearance, but on August 20th, about a month and a half later, further confirming his position, moved *"on the defendant's notice of appearance herein* filed in the Office of the Clerk of the Court, on or about the 7th day of July, 1920" (R., 7), for an order striking certain words from the complaint, or in the alternative, requiring the complaint to be made more definite and certain. That motion was made by the present plaintiff-in-error's attorneys, here again describing themselves as attorneys for the then defendant Hines, and was accompanied by an affidavit of a member of the firm of the appellant's attorneys which reads at page 8 of Record:

> "From a statement of the case *made to deponent by the defendant, his employees, agents and servants,* deponent verily believes that *said defendant* has a good and substantial defense *upon the merits* to the alleged cause of action set forth in the complaint, or to some part thereof."

Still further committing themselves to the proposition that the court acquired jurisdiction over the defendant Hines, and that in consequence, the action must have been properly commenced, as far as jurisdiction of the person was concerned, the plaintiff-in-error's attorneys served on behalf of the defendant Hines, on September 16, 1920, *an answer raising issues of fact on the merits.* In this answer the appellant's attorneys for the first time denied that Walker D. Hines is the present Director-General of Railroads, but by

failing to deny, admit that portion of the amended complaint set forth at pages 8 and 9 of Record, which reads:

> "By General Order No. 50 *duly made and issued pursuant to law* by the *said* Director-General, it was ordered and directed in substance, that suits and litigations growing out of matters arising out of or during Federal control of said railroad, should be brought against the said Director-General of Railroads, *or his successor in office;* and by the Federal Transportation Act of 1920, it was provided that suits and litigations growing out of said Federal control be brought against the Agent designated by the President of the United States of America, and the President has by proclamation duly designated *the present Director-General of Railroads, Walter D. Hines, or his successor in office* to be such agent." (Italics are ours.)

From the above, it clearly appears that several acts were done by the defendant Hines to confer jurisdiction of his person upon the Court, thus indicating a proper commencement of the action in that respect. These acts were:

(a) Filing of a voluntary and general notice of appearance.

(b) Moving to strike out certain parts of the complaint and moving to make it more definite and certain, and basing said motion upon his general appearance and upon an affidavit of merits by the plaintiff-in-error's attorneys.

(c) Answering on the merits to the amended complaint.

That the defendant Hines was not actually in office at the time that he took the above mentioned steps in this action, his then attorneys, who are also the present plaintiff-in-error's attorneys, should not be permitted to urge to defeat the judgment now recovered. Whatever the responsibili-

ties of Mr. Hines to his principal, the President of the United States Government, for appearing generally and proceeding with the action at a time when he had already resigned as Agent, certainly from his wrongdoing, if such it was, no harmful effects should accrue to this innocent plaintiff. Least of all should the plaintiff-in-error's attorneys be entitled to come into the same jurisdiction to which they subjected their client in 1920, with the argument now advanced that, by reason of their client's resignation at the time of their general appearance for Mr. Hines, no effect should be given to their action.

The fact that Mr. Hines was not being sued in his individual capacity, but as an Agent of a governmental branch, does not alter the situation. It is well established by abundant authority that the Government itself is perfectly competent to waive the jurisdictional defense and immunity from suit by a general appearance, as in fact was done in this case, if it should be contended that the real defendant was the United States acting through its Agent, the defendant Hines.

As early as 1883, the Supreme Court of the United States, referring to the State of Rhode Island, said in

Clark vs. *Barnard*, 108 U. S. 436, 27 Law Ed. 780:

> "The immuniy from suit belonging to a state, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege *which it may waive at pleasure;* so that in a suit otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction. * * * In the present case the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy and thereby made itself a party to the litigation to the full extent required for its complete determination."

Again in

Gunter vs. *Atlantic Coast Line R. R. Co.*, 200 U. S. 273, 50 Law Ed. 477,

it was said:

"Although a state may not be sued without its consent, such immunity *is a privilege which may be waived*, and hence where a state voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibition of the Eleventh Amendment."

In

Richardson v. *Fajardo Sugar Co.*, 241 U. S. 44, 60 Law Ed. 879,

the Court extends the same doctrine applied in the case of states to sovereign governments. There it is said:

"A reversal of the District Court's action is asked upon the theory that the proceeding is against Porto Rico, *a government of sovereign attributes*, which has only consented to be sued in its own courts. Porto Rico v. Rosaly y Castillo, 227 U. S. 270. Whatever might have been the merit of its position, if promptly asserted and adhered to, we hold, following the principles announced in Porto Rico vs. Ramos, 232 U. S. 627, *that having solemnly appeared and taken the other steps above narrated, plaintiff in error could not thereafter deny the court's jurisdiction.*"

The same conclusions were reached in

Veitia vs. *Fortuna Estates*, reported in 240 Fed. 256-262.

The action of the defendant Hines considered therefore, either as an action by an individual defendant, or by the sovereign government of the United States, acting through an individual, gave to the court that jurisdiction of the de-

fendant which precludes a claim that the action was not properly commenced because of lack of jurisdiction of the defendant's person.

Furthermore, however, the Court not only had jurisdiction of the person, but also of the subject matter, thus disposing of all doubts as to the proper commencement of the action.

II.

The Court had jurisdiction of the subject-matter.

The section of the Federal Statute giving jurisdiction over *the subject matter of this action* to the Supreme Court of the State of New York is Transportation Act 1920, Section 206A (41 U. S. Stat. at Large, pp. 456, *et seq.;* Federal Annotated Statutes, Supplement 1920, p. 77). It reads:

> "Sec. 206 (a) (Actions against agent of President—period of limitation—courts having jurisdiction.) Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier. (41 Stat. L. 461.)"

The injuries complained of by the plaintiff were received on February 22, 1920, in New York State upon a train of the Lehigh Valley Railroad which at that time was under Federal control. The former defendant, Walker D. Hines, was then Director-General of the Lehigh Valley Railroad. On March 1, 1920, the Federal control of the railroads terminated. On March 11, 1920, Walker D. Hines was appointed Agent by the President under the Act above quoted, by means of the following proclamations:

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA
A PROCLAMATION.

WHEREAS, Section 206 of the Act approved February 28, 1920, entitled "An Act to provide for the termination of Federal control of railroads and systems of transportation; to provide for the settlement of disputes between carriers and their employees; to further amend an Act entitled 'An Act to regulate commerce', approved February 4, 1887, as amended, and for other purposes", provides that the President shall within thirty (30) days after the passage of said Act designate an agent against whom shall be brought actions at law, suits in equity, and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier.

NOW, THEREFORE, I, Woodrow Wilson, President of the United States, under and by virtue of the power and authority so vested in me by said Act, and of all other powers me hereto enabling, do hereby designate and appoint Walker D. Hines, Director General of Railroads, and his successor in office, as the agent provided for in Section 206 of said Act, approved February 28, 1920.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done by the President in the District of Columbia this 11th day of March, in the year of our Lord, Nine-

teen Hundred and Twenty, and of the Independence of the United States the One hundred and Forty-fourth.

WOODROW WILSON.

By the President:
FRANK L. POLK,
Acting Secretary of State.
(Seal)

The action was commenced on June 19, 1920, and the notice of appearance giving the court jurisdiction of the defendant was served on July 6, 1920.

It will be thus noted that there are here present all the elements required to give the Supreme Court of New York State jurisdiction of the subject matter under the Statute above quoted, namely:

(a) A cause of action at law;

(b) A cause of action arising out of the possession, use, or operation by the President of the United States of the Lehigh Valley Railroad.

(c) A cause of action of such a character as prior to Federal control could have been brought against Lehigh Valley Railroad.

(d) Termination of Federal control at the time the action was brought.

(e) The bringing of the action within two years of the date of the passage of the Act and within the limitation period prescribed by law.

(f) The bringing of the action in a court which, but for Federal control, would have jurisdiction of the case against the Lehigh Valley Railroad, had it arisen against that railroad.

The New York Supreme Court's jurisdiction of the subject matter of the action is thus fully established.

The additional requirement in the statute above quoted, that the action should be brought against "An Agent designated by the President for such purposes within thirty days after the passage of this Act," is one which does not affect the jurisdiction requirements as to subject matter, but affects solely the personality of the defendant.

As a matter of fact, the defendant sued by the plaintiff exactly fits the description of the defendant required to be sued under the Statute, namely, "an Agent *designated* by the President for such purposes *within thirty days after the passage of this Act.*"

There was only one agent that was ever appointed by the President who fits the description of the Statute, and that Agent was the defendant Walker D. Hines, against whom the plaintiff brought the action. All other agents appointed by the President were not appointed "within thirty days after the passage of this Act," but were appointed long after. Thus, James Barton Payne was appointed on May 18, 1920, about seventy-eight days after its passage, and James C. Davis over a year thereafter.

There is no additional requirement in the Statute that the Agent should be in office at the time the action is commenced, it possibly being recognized by Congress that the office of Agent was a continual one regardless of the personality of the incumbent at any time. If not intended by Congress, it was at least so recognized and interpreted by the President, for in all proclamations appointing agents under this Statute (including the one above set forth), it will be noted the President has departed from the wording thereof and instead of appointing merely an agent, has, in each case, appointed the Agent "and his successor in office." We are not now questioning the right of the President to appoint an Agent "and his successor in office" under Section 206 (a) of the Transportation Act 1920, which makes no mention of a successor. However that may be, we here call attention to this fact solely for the purpose of indicating

that governmental authorities interpreted this Statute as creating a continuous office of Agent regardless of the personality of the incumbent. That such was in fact the case is further borne out by judicial interpretation of the Statute, as, for instance, in the case of

Daugherty vs. *Payne,* 191 Fed. 61,

where it was said:

> "No new cause of action resulted by the mere substitution of one individual for another in the office of Agent or Director-General."

If this be true, it, of course, follows that the requirements of the Statute with respect to the party to be sued, are quite distinct from the requirements setting forth the elements necessary for the court to have jurisdiction of the subject matter.

We have in this point shown that the court had jurisdiction of the subject matter; in the preceding point we showed that the Court had jurisdiction of the defendant, acquired by his appearance and answer. The two tests of jurisdiction, therefore, namely, that of person and subject matter, having been met, it follows that the action was properly commenced.

We will now attempt to show that it was not only properly commenced, but also properly prosecuted to final judgment.

III.

The action was properly reinstated and the present defendant was properly substituted.

The Act of February 8, 1899 (Comp. Stats., Paragraph 1594, United States Compiled Statutes, Annotated 1916, p. 3203), required that in order to reinstate actions abated by reason of the resignation of the head of any department, a

motion be made for that purpose, but no later than twelve months after the resignation.

In order to remove the bar of this twelve-month limitation as applied to actions arising from the Federal control of Railroads, Congress passed on March 3, 1923, "An Act to amend Section 206 of the Transportation Act 1920" (42 U. S. Statutes at Large 1443, Federal Statutes Annotated, Supplement 1923, p. 62), reading as follows:

> "(h) Actions, suits, proceedings, and reparation claims, of the character described in subdivision (a), (c) or (d), properly commenced within the period of limitation prescribed, and pending at the time this subdivision takes effect, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office, of the Director-General of Railroads or the agent designated under subdivision (a), but may (despite the provisions of the act entitled 'An Act to prevent the abatement of certain actions,' approved February 8, 1899), be prosecuted to final judgment, decree, or award, *substituting at any time before satisfaction of such final judgment, decree or award, the agent designated by the President then in office.*
>
> "(1) Orders providing for a substitution in such cases made before this subdivision takes effect by courts having jurisdiction of the parties and subject matter are hereby validated, anything in such act of February 8, 1899, to the contrary notwithstanding. *Actions, suits, reparation claims, or other proceedings of the character described in subdivision (h) which have been abated or dismissed solely because of the provisions of such Act of February 8, 1899, shall be reinstated upon reasonable notice to the adverse party, and upon proper motion therefor filed within one year from the time this subdivision takes effect.*" (Italics ours.)

The elements necessary to bring the present action under the operation of this Statute and to entitle it to reinstatement against the Agent then in office were:

(A) The action had to be properly commenced within the period of limitation prescribed by Federal or State statutes, but not later than two years after the passage of the Transportation Act of 1920.

(B) The action must be pending, or if not pending, must have been abated or dismissed solely because of the provisions of the Act of February 8, 1899.

(C) The motion must be made one year from the date of the Act, that is, before March 3, 1924, upon reasonable notice.

The element (A) is fully discussed in the first two points of this brief, wherein we believe we have shown that the action was properly commenced within the limitation period prescribed by Federal or State Statutes.

Element (B) is supplied by the fact that the action against Hines was marked "abated" by appellant's attorneys on February 13, 1923. This occurrence is described in the affidavit of Walter A. Lynch (R., 13) as follows:

> "That the reason for the action being marked 'abated', as deponent is informed and believes, was the fact that the defendant Walker D. Hines had on the 13th day of February, 1923, ceased to hold office as the Agent designated by the President, and that his tenure of office had expired more than one year prior to the said 13th day of February, 1923, and through inadvertence plaintiff's attorneys had failed to move for a substitution of the new Director General of Railroads and Agent designated by the President as a party defendant within the limitations in such cases made and provided by the United States Revised Statutes."

Clearly, therefore, the action is one which, in the words of the Statute, had been "abated or dismissed solely because of the provisions of such Act of February 8, 1899."

The last element (C) is supplied by the fact that the motion to reinstate and substitue was made on August 20,

1923 (R., 12), a long time before the expiration of the limitation period, namely, March 3, 1924, and that the motion was made upon reasonable notice both to the attorneys for the defendant Hines and to the attorney for the defendant Davis (R., 12).

It is therefore apparent that the action heretofore brought against the defendant Hines was properly and legally reinstated by order of October 31, 1923, signed by Justice McGoldrick of N. Y. Supreme Court, reinstating the cause of action and substituting James C. Davis, Director-General of Railroads, as Agent Designated by the President, as party defendant (R., 14).

IV.

The action herein was not barred by the various statutes of limitations because the reinstatement thereof against the defendant James C. Davis did not commence a new action, but constituted merely a continuance of the original action, which was not barred by any statute of limitations.

The only theory upon which plaintiff-in-error can contend that the various statutes of limitations bar the present action, is upon the theory that it was commenced not at the time of the appearance of the defendant Hines on July 6, 1920, but at the time of the substitution of the defendant Davis in the action when reinstated on the 31st day of October, 1923. This theory was relied on by the defendant Davis on his motion for leave to file the proposed supplemental answer. There it was expressed (R., 19) as follows:

> "That James C. Davis, Director General of Railroads as Agent designated by the President, contends that the time of the commencement of this action was the time

> he was substituted as defendant, and that the alleged cause of action is barred by both the State and Federal Statute."

It seems to us that the word "reinstatement" is necessarily not synonymous with the word "commencement," the former implying the prior existence of the thing reinstated, whereas the latter means the arising of a thing *de novo*.

In the light of the above distinction, it must be clear that this action did not arise *de novo* in 1923, but was merely revived at that time.

A similar view was taken by the Circuit Court of Appeals in

Daugherty v. *Payne*, 291 Fed. 61,

where it was said:

> "No new cause of action resulted by the mere substitution of one individual for another in the office of Agent or Director-General."

So, too, in a case arising in this State,

Evans vs. *Cleveland*, 72 N. Y. 486,

it was contended that in an action where a party had died and where the action was continued in the name of the personal representative by supplemental complaint, served pursuant to motion, the Statute of Limitations was a bar to the action, since the time of the commencement of the action should be reckoned as of the date of the substitution of the personal representative. The Court overruled this contention, saying at page 488:

> "In this case the continuance was by supplemental complaint. The service of such complaint *was not the commencement of a new action.* It was a proceeding in an action *which had been commenced and was then pending.* The action had been commenced within the year after the cause of action accrued, and it is impossible to perceive how any lapse of time subsequent to

the commencement of the action could bar the action under a Statute which prescribes a limit of time only before the commencement of the action."

See, also,

Mason vs. *Sanford*, 137 N. Y. 497.

The very wording of the order of October 31st, 1923, affirmed by this Court on January 18, 1924, indicates plainly that no action was intended to be commenced thereby, for it reads:

> "Ordered that the *said* cause of action be and the same hereby is *reinstated*" (R., 15).

The *said* cause of action is the "cause of action herein" referred to in the order; that in turn is the one described in the caption as

> "Thomas E. O'Neill, Plaintiff
>
> against
>
> Walker D. Hines, as Agent designated by the President (Lehigh Valley Railroad),
>
> Defendant."

If we are correct in our contention, there appears to be no need of discussing the various statutes of Limitations which might apply if this action had been commenced in 1923, for as a matter of fact, it was commenced in 1920, at which time, none of these Statutes would bar the action.

V.

The cases cited by the plaintiff-in-error are not applicable and can be distinguished in all vital details from our instant case.

The plaintiff-in-error places his main reliance upon the cases of:

Dahn v. *Davis*, 258 U. S. 421;
DuPont & Co. v. *Davis*, 264 U. S. 456;
Davis v. *Donovan*, 265 U. S. 257;
Davis v. *Cohen*, 268 U. S. 638;
U. S. ex rel. Rauch v. *Davis*, 8 Fed. (2nd) 907;
Mellon v. *Weiss*, 270 U. S. 565.

The case of *Dahn* v. *Davis*, 258 U. S. 421, stands for the proposition that a suit against the Director General or Agent designated by the President, is in reality a suit against the United States. It re-emphasizes the doctrine that in taking over and operating the railroads, the United States acted in its sovereign capacity, and it leads to the inference that some sovereign capacity is involved in actions in which the Agent designated by the President is involved. There is nothing inconsistent in this case with what the defendant-in-error claims in the present action.

The case of *DuPont* v. *Davis*, 264 U. S. 456, also emphasizes the doctrine in taking over and operating the railroads, the United States acted in its sovereign capacity. With this proposition we have no quarrel. In fact, this is one of our strongest arguments, that the United States in its sovereign capacity and through the various agents designated by it, is the real proper defendant in this action and should be held liable in this connection.

Davis v. *Donovan*, 265 U. S. 257, is next considered. This case merely stands for the proposition that the Director

General operating the railways, acts as a representative of each of the roads in question, and if a cause of action arises against one of the roads, no other railroad is involved. In other words, a suit against one railroad while under Federal control, merely becomes a suit against the Director General operating that particular railroad in question, every railroad system being operated as an entity.

Davis v. *Cohen*, 268 U. S. 638, is an important case and has been frequently cited. The facts in this case are different from the facts in ours. The Cohen action was brought by Cohen & Co. against the New York, New Haven and Hartford Railroad to recover damages. While the Railroad Company was described in the writ as a corporation "operated and controlled by the United States Railroad Administration", the writ was directed to and served upon the railroad company alone, no effort being then made to sue the Director General. Later on on an *ex parte* application, the writ and declaration were amended by striking out the name of the Railroad Company and substituting the name of James C. Davis, Agent and Director General of Railroads "as party defendant". The court, in passing upon this case, stated that the Railroad Company was not liable because the cause of action had arisen during Federal control; the sole liability being that of the Director General as the representative of the Government. The Court further held the original suit against the Railroad Company was not a suit against the Director General and the service of the original writ upon the Railroad Company did not bring the Director General before the Court. The Court further held that the amendment of the writ in the suit against the Railroad Company by substituting the designated Agent as the proper defendant, was in fact the commencement of a new and independent proceeding to enforce this liability, and as the time when said amendment was made, was after the two year period, the court held that same was barred by the limitation provision.

In our case, the facts are different. To begin with, the Railroad Company was not originally sued by O'Neil, the Defendant-in-Error, but rather the designated Agent of the Government was sued. When the amendment was made, it was not made *ex parte* as in the Cohen case, but on proper application and on motion to all interested parties. The United States Government, through its designated Agent was originally served, and it cannot be said, as in the Cohen case, that the Agent was never before the Court. At least one Agent was before the Court, and if said Agent was not the proper one, nevertheless, it would seem that there was an irregularity, and not a vital defect. The Government, through one of its former Agents, had notice of the suit, and in as much as the United States is the real defendant, the substitution of the proper Agent's name would seem to be a formality.

In distinguishing this case, we respectfully submit that the following authorities are in point.

Arkansas L. & L. Co. v. *Davis,* 145 Ark. 541;
Wolf v. *Cook,* 40 Fed. 432;
Texas & P. R. Co. v. *Cox,* 145 U. S. 593;
Dickinson v. *Stiles,* 246 U. S. 631;
Robb v. *Connolly,* 111 U. S. 624;
Mondou v. *N. Y., N. H. & R. R. Co.,* 223 U. S. 1, 56.

These authorities stand for the proposition that allowance of the substitution of the party defendant as of the date of the commencement of the action, is in accord with the policy of the state and federal courts not to permit technicalities to hinder justice.

The last case that the plaintiff-in-error lays emphasis upon, is *U. S. ex rel Rauch* v. *Davis,* 8 Fed. (2nd) 907. In said last named case, a judgment was recovered in 1922 against **Walker D. Hines, Director General,** etc." and later on an order was made amending said judgment to read as against "James C. Davis, Director General, etc. and Agent of the

President." The Court held that the order of the court in allowing this amendment was void, since Hines was sued oniy as Director General, **and not as Agent designated by the President,** these being distinct and separate offices, and since in fact Hines did not hold either office when the summons was served. The Court further goes on to say that the Act (Transportation Act) provides that after the termination of Federal control, actions of this character may be brought only against the Agent designated by the President for that purpose.

In our case Hines was sued not as Director but as Agent, as prescribed in the Transportation Act of 1920.

The case of *Mellon* v. *Weiss,* 270 U. S. 565, is obviously not in point, since in that case, the action at the termination of the Federal Control of the railroads was pending against *the railroad company,* and not against the government, whereas in our case the action from the beginning was against the U. S. Government. Under the circumstances the court in *Mellon* v. *Weiss* ruled that the substitution of the Agent and Director General, after the statutory period had run against the action, is of no avail, since it is the beginning of a new action against the Government and not a reinstatement of an old action. It will be further noted that in that case, Davis, the Director General appeared *specially* to object to the jurisdiction of the court over him and there was no general appearance as in our instant case.

VI.

The Court having jurisdiction of the person, by defendant Hines' voluntary appearance, and jurisdiction of the subject matter by Federal statute, the action was properly commenced in 1920: this, followed by the reinstatement of the cause of action and the substitution of the present defendant Davis in accordance with the Federal statute covering the case, resulted, after trial, in a judgment which was properly and lawfully procured against the defendant Davis, the predecessor in office of the present plaintiff-in-error who has been properly substituted (R., 29).

All of which is respectfully submitted.

OLCOTT, OLCOTT & GLASS,
Attorneys for Defendant-in-Error.

NATHAN BALLIN,
Of Counsel.

APPENDIX.

Chap. 233.—An Act to Amend Section 206 of the Transportation Act, 1920.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 206 of the Transportation Act, 1920, is amended by adding at the end thereof two new subdivisions to read as follows:

"(*h*) Actions, suits, proceedings, and reparation claims, of the character described in subdivision (*a*), (*c*), or (*d*), properly commenced within the period of limitation prescribed, and pending at the time this subdivision takes effect, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under subdivision (*a*), but may (despite the provisions of the Act entitled 'An Act to prevent the abatement of certain actions,' approved February 8, 1899), be prosecuted to final judgment, decree or award, substituting at any time before satisfaction of such final judgment, decree or award the agent designated by the President then in office. Nor shall any action, suit, or other proceeding heretofore or hereafter brought by any public officer or official, in his official capacity, to enforce or compel the performance of an obligation due or accruing to the United States arising out of Federal control, abate by reason of the death, resignation, retirement, or removal from office of such officer or official, but such action, suit or other proceeding may (despite the provisions of such Act of February 8, 1899), be prosecuted to final judgment, decree or award, substituting at any time before satisfaction of any such final judgment, decree, or award the successor in office.

"(*i*) Orders providing for a substitution in such cases made before this subdivision takes effect by courts having jurisdiction of the parties and subject matter are

hereby validated, anything in such Act of February 8, 1899, to the contrary notwithstanding. Actions, suits, reparation claims, or other proceedings of the character described in subdivision (*h*) which have been abated or dismissed solely because of the provisions of such Act of February 8, 1899, shall be reinstated upon reasonable notice to the adverse party, and upon proper motion therefor filed within one year from the time this subdivision takes effect."

Approved, March 3, 1923.

SUPREME COURT OF THE UNITED STATES.

No. 74.—October Term, 1927.

Andrew W. Mellon, Director General of Railroads, as Agent designated by the President, etc., Plaintiff in Error, *vs.* Thomas E. O'Neil. | In Error to the Supreme Court of the State of New York.

[November 21, 1927.]

Mr. Justice Sanford delivered the opinion of the Court.

The record presents a preliminary question as to our jurisdiction under the writ of error.

The writ is brought to review a judgment of the Appellate Division of the Supreme Court of New York, which affirmed, without opinion, a judgment rendered at Trial Term against the plaintiff in error, as Agent designated by the President under the Transportation Act, 1920. 215 App. Div. 766. Leave to appeal to the Court of Appeals was denied both by the Appellate Division and by the Court of Appeals; and the judgment of the Appellate Division thereby became the final decision of the highest court of the State in which a decision could be had.

This judgment was entered after the Jurisdictional Act of 1925[1] took effect. The only error assigned here that presents a ground for the writ of error under § 237 of the Judicial Code as amended by § 1 of this Act,[2] is that the provisions of the New York Civil Practice Act relating to the amendment of process and substitu-

[1]43 Stat. 936, c. 229; printed as an Appendix to the Revised Rules of this Court, 266 U. S. 687.

[2]Sec. 237 (a) of the Judicial Code, as thus amended, now provides that: "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

tion of parties, as applied in allowing the substitution of the predecessor of the plaintiff in error as the party defendant, are invalid because of repugnancy to the laws of the United States.

The record, however, does not show that this question was either presented to or passed upon by the Appellate Division. No reference to the Practice Act or challenge to its validity appears in the proceedings either at Trial Term or in the Appellate Division.[3]

It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. *Whitney* v. *California,* 274 U. S. 357, 360; and cases cited. It is not enough that there may be somewhere hidden in the record a question which if it had been raised would have been of a federal nature. *Dewey* v. *Des Moines,* 173 U. S. 193, 199; *Keokuk & Hamilton Bridge Co.* v. *Illinois,* 175 U. S. 626, 634; *Whitney* v. *California, supra,* 362.

For these reasons the writ of error must be dismissed. And, regarding the writ, under the Jurisdictional Act, as a petition for certiorari, it is denied.

Writ of error dismissed for want of jurisdiction; certiorari denied.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[3]In this respect the present case is essentially different from Davis *v.* Cohen Co., 268 U. S. 638, 640, in which the plaintiff in error had at the outset challenged the validity of any provisions of the Massachusetts Laws purporting to authorize the proceeding by which he had been substituted as the party defendant, as being repugnant to the Transportation Act, and had preserved this objection at every stage of the case.